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525	foot-note (9)	4 Drew. 658, 632	4 Drew. 628, 632.
556	— 9	any	anything.
607	13 and 14	and the nieces and nephews of her sister	and her nieces and nephews the children of her sister
613	— 14	and adverse to that decision the late	and adverse to that decision; while the late
641	foot-note (5)	9 H. L. C. 346	9 H. L. C. 246.

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CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
BANKRUPTCY AND LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

LYELL *v.* KENNEDY.

[1881 L. 30.]

C. A.
1884
March 19, 20, 25, 26, 29; *April* 8.

Practice—Interrogatories—Discovery—Attempt to falsify Claim for Privilege—Affidavit of Documents—Rules of Court, 1875, *Order* XXXI., *rr.* 9, 10, 11, 23 —*Rules of Supreme Court*, 1883, *Order* XXXI., *rr.* 10, 11, 14, 24.

Where in an answer to interrogatories the party interrogated declines to give certain information on the ground of professional privilege, and the privilege is properly claimed in law, the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated.

The mere existence of a reasonable suspicion which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified.

The duty of the Court with reference to answers to interrogatories is now regulated by Order XXXI., rules 10, 11, and limited to considering the sufficiency or insufficiency of the answer, *i.e.*, whether the party interrogated has answered that which he has no excuse for not answering—and only in the case of insufficiency can it require a further answer :—

Semble (*per Bowen*, L.J.), that an embarrassing answer to interrogatories may be dealt with as insufficient.

A party interrogated may, on a question of sufficiency, refer to his whole affidavit in answer to interrogatories, and is not restricted to the passages dealing with any particular interrogatory, and all embarrassment to the

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interrogating party is now obviated by the provisions of Order XXXI., rule 24; but he must not endeavour to import into an admission matter which has no connection with the matter admitted.

A waiver of privilege in respect of some out of a larger number of documents for all of which privilege was originally claimed does not preclude the party from still asserting his claim of privilege for the rest.

Although *primâ facie* privilege cannot be claimed for copies of or extracts from public records or documents which are *publici juris*, a collection of such copies or extracts will be privileged when it has been made or obtained by the professional advisers of a party for his defence to the action, and is the result of the professional knowledge, research, and skill of those advisers.

The Defendant *K.* in his answer to interrogatories objected to disclose certain information asked for by the Plaintiff *L.* on the ground of professional privilege, which the Court held properly claimed in law. *L.* sought by reference to certain admissions in the answer itself, and from documents referred to in the interrogatories and answer, as well as from documents scheduled to *K.'s* affidavit of documents, to shew that the information sought was obtained under circumstances which negatived the claim of privilege, and sought a further answer:—

Held (affirming *Bacon*, V.C.), that no further answer should be required, as the admissions in the answer and in the documents referred to therein only raised a case of suspicion at the most, which might be capable of explanation if *K.* were at liberty to make an affidavit.

The Court declined to decide how far, under the present practice, reference could be made, as against the interrogated party, to any document in possession not referred to in his answer, but only scheduled to his affidavit of documents.

K.'s solicitors had for the purposes of *K.'s* defence in the action procured copies of and extracts from certain entries in public registers, and also photographs of certain tombstones and houses to be taken, for which *K.* in his affidavit of documents claimed protection:—

Held (affirming *Bacon*, V.C.), that although mere copies of unprivileged documents were themselves unprivileged, the whole collection, being the result of the professional knowledge, skill, and research of his solicitors, must be privileged—any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case.

THIS was an appeal by the Plaintiff from an order of Vice-Chancellor *Bacon*, dismissing a summons taken out by the Plaintiffs on the 11th of January, 1884, asking for a declaration that the Defendant's answer to interrogatories was, having regard to the answers to certain interrogatories specified in the summons, and to the 28th paragraph of the answer hereinafter stated, insufficient, embarrassing, and impertinent, as also his affidavit of documents; and that the Defendant might be ordered to file a further and better answer and affidavit of documents, to allow the Plaintiff to inspect and take copies and extracts of certain documents (numbered 5 and 7 in the 4th paragraph of the affidavit), being copies of entries in registers and public records, and of other original documents, and of photographs of tombstones and houses, notwithstanding the privilege claimed by him.

The Defendant had after the application before the Vice-Chancellor put in a further answer to certain of the interrogatories mentioned in the summons, and on the appeal the contention was restricted to the 10th, 18th, and 21st interrogatories.

This action and the cross-action of *Kennedy* v. *Lyell* have been before the Court on various applications with regard to discovery of documents and privilege (1), where the facts of the case sufficiently appear.

The 10th interrogatory asked in whose name the hereditaments, the subject of the action, were entered in the parish or district rate-books, at or before the death of *Ann Duncan*, and proceeded—"say whether you have ever, and when, first caused them or any of them to be entered in the said books in your own name?"

The Defendant in answer merely craved leave to refer to the rate-books, which he alleged not to be in his, or any solicitor's or agent's of his, possession, custody, and control, and submitted that no entry in any such books could be used in evidence against him in this action.

Interrogatory 18 asked whether the Defendant did not swear an affidavit in an action brought against him by the Plaintiff, on or about the 31st of May, 1880, or when? . . . . and asked him to "declare whether he had ever, previously to the 31st of May, 1872, alleged or represented to any claimant, or any person on behalf of such claimant, that he was entitled, or believed himself entitled, to the hereditaments as devisee under a will made by *Ann Duncan* in his favour, or otherwise, and how in his own right?"

The Defendant in par. 22 of his answer admitted swearing the affidavit, and entered into an explanation, shewing that in consequence of some investigations his solicitors had made on his behalf, for the purpose of the defence of his title since the dismissal of that action, he had been informed by them that the

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(1) 20 Ch. D. 484; 8 App. Cas. 217; 23 Ch. D. 387; 9 App. Cas. 81.

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information on which the former affidavit had been based was erroneous, and that in consequence statements made in that affidavit were contrary to fact.

He also stated that he had asserted to the Plaintiff and other claimants, and to their solicitors, that he was entitled, and believed himself to be entitled as devisee, of *Ann Duncan*, and craved leave to refer to a certain letter set out in a paper Book A, referred to by the interrogatories.

The 21st interrogatory was identical in substance with interrogatory 31 in the cross-action of *Kennedy* v. *Lyell* (1), and the preliminary declaration demanded by it, and the first five subsections therein referred to, are not repeated.

By sub-sect. 6 the Defendant was asked whether *Macfarlane Wylie* had not reported to him, and when, that *Ann Duncan* was the last lawful descendant of her great grandparents, and each of them, and whether the executors of *Ann Duncan*, and also the Court of Session in 1871 and 1872, had not caused advertisements to be issued for heirs to her on the father's side, and that no persons alleging could prove such relationship.

Sub-sects. 7, 8, 9, and 10 were all inquiries as to the steps in the pedigree of the *Cunningham* family from *Ann Duncan* (*née Cunningham*), the paternal grandmother of *Ann Duncan*, the intestate, down to the coparceners whose interests the Plaintiff had purchased.

Sub-sect. 11 was an inquiry directed to prove that the coparceners were at the death of *Ann Duncan*, the intestate, the co-heiresses of *George Cunningham*, the father of the said *Ann Duncan*, the intestate's grandmother, and if not, it required the Defendant to say what descendants of *George Cunningham* were at that time his heirs, and their names and addresses, and their degree of relationship to him.

Sub-sect. 12 asked whether the Defendant did not file, on or about the 1st of June, 1880, two affidavits, one by *Alexander Moncrieff*, and the other by *Daniel Peterson*, in the Plaintiff's late action, and as to the identity of the persons mentioned in the affidavit with the persons referred to in the 7th, 8th, and 9th subsections of the 21st interrogatory.

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(1) 23 Ch. D. 387, at pp. 389 *et seq.*

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In answer to the 21st interrogatory, the Defendant, by par. 25, craved leave to refer to his former answer in this action, and stated that he had from time to time under threats of and in anticipation and contemplation of immediate litigation on the part of persons claiming to be heirs of *Ann Duncan*, caused searches and inquiries to be made by his solicitors and agents employed by them for defending his title to the property, and for no other purpose, and that except as aforesaid, and for the purposes aforesaid, he had never made, or caused to be made, any search or inquiry such as those mentioned in the 21st interrogatory, or touching the matters referred to therein, or any of them. He admitted that his solicitors did, under the circumstances, and for the purposes aforesaid, employ *Macfarlane Wylie*, but denied that he had reported that the male paternal line of *Ann Duncan* became extinct by her death; but that, on the contrary, he was informed by his solicitors, and believed, that *M. Wylie* asserted his belief that there were now alive persons related to her in that line.

By par. 26, in further answer to interrogatory 21, he admitted that *Ann Duncan* (the intestate), died at *Balchystie* on the 5th of November, 1867, a spinster, that she was the daughter of one *David Duncan*, and proceeded, "except as aforesaid I have no personal knowledge of any of the matters inquired after by the 21st interrogatory, and the only information and belief that I have received or have respecting any of such matters has been derived from, and is founded upon, information of a confidential nature procured by my solicitors or agents for the purpose of my defence against the aforesaid claims, and in defence of my title, and for the purpose of enabling them and counsel to advise me, and conduct my defence against the aforesaid claims." He also objected to answer certain parts of the 21st interrogatory on the ground that the matters inquired after related exclusively to his own case, but this objection need not, having regard to the judgment, be referred to in more detail.

By the 27th paragraph the Defendant, in answer to the 12th sub-section of interrogatory 21, entered into a very long explanation, correcting certain misstatements in the affidavits of *Moncrieff* and *Peterson* referred to in that sub-section, and at the end admitted that "under the circumstances and for the purposes aforesaid he did, in the Plaintiff's first action against him, file the affidavit mentioned in that sub-section, and that, subject to such explanation as aforesaid, and to the submission thereinafter contained the persons respectively mentioned in the said affidavits were the same as the persons of the corresponding names in the 7th, 8th, and 9th sub-sections of the said interrogatory. For the reasons hereinbefore stated I do not admit that any of such persons were related in blood to any others of them."

Par. 28 was as follows: "All the answers and admissions hereinbefore made are made subject and without prejudice to my right to object to the same being used against me on the trial of this action on the ground that the matters stated or admitted are irrelevant, or immaterial, or inadmissible in evidence against me, having regard to the nature of the issues to be tried, and the pleadings in this action."

Par. 29 was as follows: "In answer to each of the said interrogatories I crave leave to refer to my former answer and to the answers therein and herein contained to the other interrogatories."

The Defendant by his further affidavit of documents filed on the 3rd of July, 1883 (par. 1), expressed his willingness, notwithstanding his objections contained in his former affidavit, to produce a large mass of the documents specified in that former affidavit, which he scheduled to the present affidavit; (par. 2), objected to produce others of the documents specified in the former affidavits, and not specified in the schedule to this affidavit, on the grounds thereinafter stated; (par. 4), objected to produce certain documents mentioned in his former affidavit on the ground that they consisted of (*inter alia*) (5.) Copies of entries in registers and public records, and of other original documents which were not, and had never been, in his possession, custody, or control. (7.) Photographs of tombstones and houses . . . . on the ground that all the said documents were made, prepared or procured by his solicitors, or by their clerks, or confidential agents, instructed or employed by them for the purpose of defending him from the claims of persons who have commenced legal proceedings against him for the recovery of the hereditaments in question in this action, and were made and procured solely for that purpose, and on the further ground that, having regard to this action, and to the actions of *Cameron* v. *Kennedy*, *Hughes* v. *Kennedy*, *Buchan* v. *Kennedy*, and *Lyell* v. *Kennedy*, the Plaintiff was not entitled to production or inspection thereof.

In par. 5 he stated that the three first named actions were brought against him by persons claiming to be heirs-at-law of *Ann Duncan*, the fourth named action being brought by the present Plaintiff claiming, as in this action, to be the assignee of her heir-at-law; that for the purposes of his defence in each case he had through his solicitors to obtain the assistance of counsel, and for that purpose to make searches and inquiries, and obtain copies of entries in registers, public records, and other original documents, not in his possession, and that his solicitors employed confidential clerks, and confidential agents, and his solicitors and their clerks and agents in the course of such employment and for the purposes aforesaid, made and obtained the copies, and procured the photographs.

In the schedule were contained a large number of documents, letters, &c., and certified copies of certain deeds of settlement, and other title deeds.

The Plaintiff desired to shew that the claim of privilege made by the Defendant contained in par. 26 of his answer could not be true, and that the Defendant must have, or be taken to have, obtained information with reference to the several points inquired after by the 21st interrogatory, and for that he referred to (*inter alia*).

(1.) An admission by the Defendant in his answer, par. 7, "That the executors of *Ann Duncan*, or Messrs. *Drummond & Nicholson* on their behalf, advertised for heirs to the said hereditaments, and that he might have been at the time aware that they were doing so, although he did not instruct or request them so to do, or concur in any way, and he also admitted that they from time to time made statements to him as to the various claims made by parties claiming to be the heir of *Ann Duncan*, and that his present solicitors in and by such of the letters as relate thereto, did advise the said *Drummond* as to the succession applicable to the hereditaments."

(2.) An admission (par. 8), that he was pursuer in certain proceedings in the Court of Session in Scotland, in the year 1871, that in the pleadings in those proceedings (and which were contained in a book referred to as C in the interrogatories and made part of the interrogatories) he had stated that he was unable to ascertain who was Miss *Duncan's* heir in heritage.

(3.) A letter scheduled to the affidavit of documents, from which it appeared that a document shewing the genealogical pedigree of the *Buchan* family, which had been sent to him by an agent of his, in or about 1872, shewing, as the Plaintiff contended, that he had information on the questions or some of the questions asked by interrogatory 21 long anterior to this action, which was brought in 1881, independently of what he obtained from his solicitor for the purposes of this action.

(4) Certain correspondence contained in a paper book, marked A, also referred to in his interrogatories, and which correspondence was admitted by the Defendant "for the purposes of this action, and without prejudice to my right at the trial thereof, and otherwise to object to the admissibility of the same as evidence in this action, on the ground that the same are not relevant, or material, or otherwise admissible in evidence, and subject to all other just exceptions," and particularly to the following letters:—

(*a*) A letter dated the 7th of February, 1868, from *Drummond & Nicholson* to the Defendant: "None of the next of kin of Miss *Duncan* on the father's side have yet cast up. There are plenty on the mother or *Buchan* side. The former only succeed by our law, but we believe that by your law the latter succeed equally with the next of kin on the other side."

(*b*) February 12, 1868. From same to same. "Please inform Mr. *Earle* that Miss *Duncan's* grandfather had three brothers and a sister, two of the brothers being older and one younger than himself. We do not know where the sister stood. That grandfather's descendants are now extinct by the death of Miss *Duncan*, but there are descendants of the three brothers and sister, some one of whom will succeed to the English estate failing heirs on the father's (*Duncan's*) side."

(*c*) March 22, 1871. From same to same—in answer to a letter of the Defendant to a Dr. *Todd*, asking him with reference to the claimants, which had been forwarded to them. "Dr. *Todd* has sent us your letter. There are numerous claimants on the *Duncan* side, who, if they establish their claim, will come in for the property in *Manchester* as well as the personal property under your charge. Some of them claiming to descend from *Matthew Duncan*, a brother of Miss *Duncan's* great grandfather, *Geo. Duncan*, of *Waltree* parish, of *Rhynd*, *Perthshire*, have raised an action in the Court of Session, for division of the personal property in the hands of Miss *Duncan's* executors. . . . . There are other claimants on the same side, who claim to be descended from the said *Geo. Duncan*."

(*d*) April 16, 1872, from the Defendant to a Mr. *Buchan*, one of the claimants in the maternal line: " Mr. *Nicholson* and I are at law respecting the right to administer Miss *Duncan's* personal estate, and how the matter will end I don't know. I am acting for the heir-at-law, whoever he may be. Now, without giving an opinion as to your chance of succeeding, for you appear to be forty-fourth in descent from Miss *Duncan* according to the law of succession, it is possible that, failing heirs in the paternal branch of Miss *Duncan's* family, you may succeed. I have written to *Scotland* to make minute inquiries as to the chance of those persons succeeding," &c.

MacClymont, and *Wallace*, for the Appellant:—

The Defendant's answer to interrogatories is insufficient, and should be struck out as embarrassing and impertinent, on the grounds,—that he has so constructed his answer that no single admission can be used against him; that an involved statement is introduced into par. 27 having no connection with the admission at the end of that paragraph, and which admission is again so qualified as to be useless for the Plaintiff, and that plain questions of fact asked in pars. 10 and 18 are unanswered; and, further, that pars. 28 and 29 should be expunged. We further contend that the claim for protection under which he shelters himself from giving any answer to interrogatory 21 is falsified by statements in the answer itself, and from documents referred to in it and also scheduled to the affidavit of documents, and that the answer and affidavit of documents form substan-

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tially one document now, as under the old practice they used to be in fact, so that the documents scheduled to the affidavit must be treated as incorporated in the answer; and that as a claim for protection in the affidavit of documents may be falsified upon a case of suspicion derived from statements in the affidavit itself, or documents referred to therein, or in the pleadings, or from inferences deducible by the Court, the same principle must apply to an answer. The Defendant is bound to make himself aware of the contents of documents which he swears to be relevant, of title-deeds in his possession, and of affidavits filed and used by him in former actions. The privilege is not properly claimed, as it is consistent with the claim that the agents mentioned by the Defendant were his own agents and not those of his solicitor. Moreover the Defendant, by consenting to produce certain documents for which he has claimed privilege, must be taken to have waived his right. In reference to the production of the items 5 and 7 in par. 4 of the affidavit of documents, we contend that public records and registers are *publici juris*, and that copies of and extracts from unprivileged documents cannot be privileged and must be produced, and that the photographs of tombstones and houses cannot be brought within the principle that gives protection to the product of the solicitor's mind. *Wigram* on Discovery (1); *Atkyns* v. *Wright* (2); *Marsh* v. *Sibbald* (3); *Evans* v. *Richard* (4); *Hardman* v. *Ellames* (5); *Unsworth* v. *Woodcock* (6); *Brown* v. *Thornton* (7); *Noel* v. *Noel* (8); *Wright* v. *Pitt* (9); *Saull* v. *Browne* (10); *Jones* v. *Monte Video Gas Company* (11); *Attorney-General* v. *Emerson* (12); *Taylor* v. *Rundell* (13); *Saunders* v. *Jones* (14); *Eade* v. *Jacobs* (15); *Flight* v. *Robinson* (16); *Compagnie Financière et Commerciale du Pacifique* v. *Peruvian Guano Company* (17); *Attorney-General* v. *Corporation of London* (18); *Manby* v. *Be-*

(1) 2nd Ed. p. 199, pl. 285.
(2) 14 Ves. 211.
(3) 2 V. & B. 375.
(4) 1 Swans. 7.
(5) 2 My. & K. 732.
(6) 3 Madd. 432.
(7) 1 My. & Cr. 243.
(8) 1 D. J. & S. 468.
(9) Law Rep. 3 Ch. 809.
(10) Law Rep. 17 Eq. 402.
(11) 5 Q. B. D. 556.
(12) 10 Q. B. D. 191.
(13) Cr. & Ph. 104.
(14) 7 Ch. D. 435.
(15) 3 Ex. D. 335.
(16) 8 Beav. 22.
(17) 11 Q. B. D. 55.
(18) 2 Mac. & G. 247.

wicke (1); *Tipping* v. *Clarke* (2); *Kennedy* v. *Lyell* (3); *Nolan* v. *Shannon* (4); *Attorney-General* v. *Burgesses of East Retford* (5); *Fleet* v. *Perrins* (6); *Balguy* v. *Broadhurst* (7); *Lewis* v. *Pennington* (8); *Ford* v. *Tennant* (9); *Nicholl* v. *Jones* (10); *Kerr* on Discovery (11); *Walsham* v. *Stainton* (12); *Churton* v. *Frewen* (13); *Wright* v. *Vernon* (14); *Felkin* v. *Lord Herbert* (15); *Friend* v. *London, Chatham, and Dover Railway Company* (16); *Fenner* v. *London and South-Eastern Railway Company* (17); *Pavitt* v. *North Metropolitan Tramways Company* (18); *Orr* v. *Diaper* (19); *Hunnings* v. *Williamson* (20): *Bustros* v. *White* (21); *Westinghouse* v. *Midland Railway Company* (22); *Quin* v. *Ratcliff* (23); *Westminster Brymbo Coal and Coke Company* v. *Clayton* (24); *Lazarus* v. *Mozley* (25); *Rumbold* v. *Forteath* (26).]

Horton Smith, Q.C., *O. L. Clare*, and *Jos. Tanner*, for the Defendant:—

The interrogatories have been sufficiently answered; the pars. 28 and 29 have been introduced merely for the Defendant's protection, in consequence of the frequent repetition of the Plaintiff's interrogatories. The only jurisdiction now possessed by the Court in questions of answers and discovery is under Ord. XXXI., rules 10 and 11, the old rules of Equity being no longer in force, and the Court cannot travel beyond the four corners of the answer, the only question for the Court to consider being whether the answer is sufficient—it cannot enter into a question of its truth or falsity. There was a distinction under the old practice between affidavits of documents and answers, no limit being put to the number of affidavits by sect. 18 of 15 & 16

(1) 8 D. M. & G. 470.
(2) 2 Hare, 383.
(3) 23 Ch. D. 387.
(4) 1 Molloy, 168.
(5) 2 My. & K. 35.
(6) Law Rep. 3 Q. B. 536.
(7) 1 Sim. (N.S.) 111.
(8) 29 L. J. (Ch.) 670.
(9) 32 Beav. 162.
(10) 2 H. & M. 588.
(11) Pages 122, 123.
(12) 2 H. & M. 1.
(13) 2 Dr. & Sm. 390.
(14) 22 L. J. (Ch.) 447; 1 Drew. 344.
(15) 30 L. J. (Ch.) 798.
(16) 2 Ex. D. 437.
(17) Law Rep. 7 Q. B. 767.
(18) 48 L. T. (N.S.) 730.
(19) 4 Ch. D. 92.
(20) 10 Q. B. D. 459.
(21) 1 Q. B. D. 423.
(22) 48 L. T. (N.S.) 462.
(23) 3 L. T. (N.S.) 363.
(24) 9 L. T. (N.S.) 534.
(25) 5 Jur. (N.S.) 1119.
(26) 3 K. & J. 44.

Vict. c. 86; and the present answer to interrogatory 21 is fuller than the answer to the corresponding interrogatory 31 in the cross-action of *Kennedy* v. *Lyell* (1), which the House of Lords held sufficient having before it all the letters now relied on by the Plaintiff. All the information sought to be protected has been supplied by the Defendant's solicitors or their agents, with a view to litigation in prospect or pending, and the whole of interrogatory 21 is an attempt to pry into the information supplied by the Defendant's solicitor. On the question of items 5 and 7 we contend that the discretion exercised by the solicitor, or by the agent employed by him, in the choice of a series of extracts and copies, records and registers, and the omission of others, prevents it being a mere servile copying of public documents, which would not be privileged, but that it represents the work of the solicitor's mind, and might be a means of shewing to the Plaintiff the idea entertained by him of his client's case: *Parker* v. *Wells* (2); *Bolckow, Vaughan, & Co.* v. *Fisher* (3); *Dalrymple* v. *Leslie* (4); *Manby* v. *Bewicke* (5); *Newall* v. *Telegraph Construction Company* (6); *Southwark and Vauxhall Water Company* v. *Quick* (7); *Bullock* v. *Corry* (8); *Wheeler* v. *Le Marchant* (9); *Penruddock* v. *Hammond* (10); *Earl of Glengall* v. *Frazer* (11); *Wood* v. *Morewood* (12); *Manser* v. *Dix* (13); *The Palermo* (14); *Nordon* v. *Defries* (15); *Kennedy* v. *Lyell* (16).

MacClymont, in reply.

Judgment was delivered on the 8th of April, 1884.

COTTON, L.J.:—

This was an appeal by the Plaintiff against two orders of Vice-Chancellor *Bacon,* one of them, the order referring to the answer to interrogatories, or affidavit filed in answer to interro-

(1) 9 App. Cas. 81.
(2) 18 Ch. D. 477.
(3) 10 Q. B. D. 161.
(4) 8 Q. B. D. 5.
(5) 8 D. M. & G. 470.
(6) Law Rep. 2 Eq. 756.
(7) 3 Q. B. D. 315.
(8) Ibid. 356.
(9) 17 Ch. D. 675.
(10) 11 Beav. 59.
(11) 2 Hare, 99.
(12) 5 Jur. 389.
(13) 1 K. & J. 451.
(14) 9 P. D. 6.
(15) 8 Q. B. D. 508.
(16) 23 Ch. D. 387; 9 App. Cas. 81.

gatories, which I call the answer, and the other to the production of documents. I will take the first order in the first instance. Before the Vice-Chancellor the Plaintiff complained that certain interrogatories were not answered; and thereupon, not by the decision of the Vice-Chancellor, but by the concession of the Defendant, to whom the interrogatories were administered, a further answer was agreed to be given to several of those interrogatories which were said not to have been sufficiently answered, and the only interrogatories which we have to consider now are the 10th, 18th, and 21st.

The Plaintiff is a man who claims by purchase from one whom he alleges to be the heir-at-law of *Ann Duncan,* who died intestate, and the Defendant *Kennedy* is a person who was trusted by her in her lifetime with the management of her estates; and he has since her death continued, and now is, in possession of the estates. The time during which he has so been in possession is sufficient to bar the claim of the Plaintiff, even if he is the assignee of the heir-at-law, subject to this—that the Plaintiff suggests that there are circumstances which prevent time being a bar in this case; and the House of Lords has laid down (though without determining anything further, or whether, even on his own shewing, he can avoid the bar of time) that the proper course as regards the questions put by the interrogatories in this action is this—to deal with them as if the alleged bar of time were the issue to be tried at the hearing, and if any of the questions are relevant to that issue to require those questions to be answered. I mention that to shew what the position of the parties is.

Now, before coming to deal with the particular interrogatories, we should, I think, deal with two points which have been raised by Mr. *MacClymont.*

He contended that a further answer ought to be required from the Defendant, not on the ground that the interrogatories have not been sufficiently answered, but on the ground that the answers were embarrassing and impertinent, and that the Defendant ought to be required to make a further answer, either by striking out those passages of which he complains, or, at any rate, by making a further affidavit. Now I give no opinion how far, on such an application as this, the Court would, if the answers were impertinent and embarrassing, require a further affidavit or answer to be sworn, and in my opinion the frame of the answers here does not render it necessary that we should decide that question.

There are three paragraphs in the answer on which the Plaintiff chiefly relied in support of his contention that the answer is embarrassing and impertinent, and I will deal with them in their order. The first in order was the 27th, and he particularly referred, not only to the great bulk of that paragraph, but also to the particular paragraphs at the end of it. Dropping for the present the point as to the great bulk of it, I will first refer to the concluding paragraphs. The Plaintiff had asked whether a certain affidavit had not been filed on behalf of the Defendant in certain proceedings which had been taken in a former action brought by the Plaintiff; and the Defendant, in the 27th paragraph of his answer, admits in substance that he did file the affidavits, but he gives an explanation why the statements in it should not be taken as *primâ facie* evidence against him, and that is complained of as embarrassing and as preventing the Plaintiff in this action from reading that admission. But, although I think that the Defendant might, and ought, to have stated his reasons for not being bound by that affidavit more shortly, and in a better form, he was perfectly justified in shewing that, from circumstances which have come to his knowledge since that affidavit was filed, he has discovered that what was there relied on was inaccurate, and that that was in consequence of the course taken by the Plaintiff. But although he has done it undoubtedly at somewhat unnecessary length, and possibly in somewhat an offensive manner, that, in my opinion, is not sufficient to justify the Court in ordering the Defendant to make a further affidavit.

Then we come to the end of the paragraph; and here there is an admission of his filing the affidavits; and he says that, "subject to such explanation as aforesaid, and to the submission hereinafter contained, the persons respectively mentioned in the said affidavits are the same as the persons of the corresponding names in the 7th, 8th, and 9th sub-sections of the same (21) interrogatory. For the reasons hereinbefore stated, I do not admit that any of such persons were related in blood to any others of them." That is somewhat involved, and I must say I

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do not quite understand what "the submission hereinafter contained" is; but, in my opinion, although it is involved, and possibly not as clear as it might have been, it is not such an embarrassment as would justify the Court in requiring another affidavit to be filed. What he means, I think, is this: "I admit the persons named are the same as the persons who are referred to in the affidavit and in the sub-sections of a particular interrogatory; but I do not admit their relationship as they are referred to in the interrogatory, as being the brothers and sisters of a person mentioned in the pedigree;" and, in my opinion, this is not a case in which the Defendant should be required to swear this affidavit without those paragraphs.

Then we come to the 28th and 29th paragraphs of the answer. Now if the answers in those paragraphs were such as to enable the Defendant if he made any admission in the answer to require the Plaintiff to read every paragraph of the answer, it would be a highly improper course for the Defendant to adopt such a form of answering. But I do not so read them. When a man is required to answer interrogatories he may on a question of sufficiency refer to the whole of his affidavit in answer, and is not confined simply to those passages which purport to deal with a particular interrogatory, and that is, I am inclined to think, what the pleader does here. But the Plaintiff cannot be embarrassed by this mode of answering, because under the new Rules he can read one passage without referring to the whole even of the same paragraph, and I think no Judge would allow a defendant where he had made an admission to read with it a passage which was not connected in sense or substance with that admission even if he had put in a statement submitting that he was entitled to do so, and claiming to do so. Of course, when an admission is read, everything ought to be read which is fairly connected with that admission; but I think it would be wrong for the Defendant, and he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted. These paragraphs, therefore, especially having regard to the new Rules, would not impede or embarrass the Plaintiff, and I do not consider that on the true reading of them such was the object and intention.

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Now we come to the interrogatories which are said not to have been sufficiently answered, and upon that point a great deal was said as to how far the old practice differed from the new. In former days the substitution, as we know, of an "and" for an "or," or of "or" for "and," was held to make the answer insufficient, and to justify the Court in requiring a further answer to be put in—but that is a thing of the past—and now it is the substance and not the form of the answer or the precise dotting of i's and crossing of t's, to which the Court must look. The first interrogatory said not to be answered is No. 10, which refers to certain rates. [His Lordship read the interrogatory.] Of course those are books which are not in the possession of the Defendant, but he has in his possession certain receipts for the rates which have been paid by him since the death of the intestate. It is admitted that he paid the rates; and in the cross-action of *Kennedy* v. *Lyell* (1)—an action for penalties—where substantially the same question arose, the then plaintiff being interrogated by the defendant, upon his undertaking to produce all the receipts for rates and taxes which were in his possession, the Court did not require a further answer, or any answer at all. There has been no answer put in here to the first part of the interrogatory, but, subject to what I am going to refer to, I think if the Defendant produces those receipts, as he offers to do, though not possibly in such a way as would have rendered it unnecessary for the Appellant to come to the Court, no further answer should be required. But the Defendant has not answered this: "Whether you have ever, and when first, caused them, or any of them, to be entered in your own name." I say he has not answered, because he has answered it in such a way that we cannot tell what he wished to state and what to deny, and he has not stated at all whether he caused them to be entered in his own name. I give no opinion as to how far an answer to that question will assist the Plaintiff in any way, but it is a plain question, and I think it ought to be answered. It may be relevant for the purpose for which the Plaintiff's counsel intended to put it, and, I think, in accordance with the ruling of the House of Lords, that the Defendant ought to put in a further answer to the question contained in the concluding paragraph of interrogatory 10 which I have read. But on his undertaking to produce all receipts for rates which are in his possession, there will be no further answer to that interrogatory, except to the last paragraph.

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(1) 23 Ch. D. 387.

Then we come to interrogatory 18. "Did you not swear an affidavit in an action brought by the Plaintiff against you in this honourable Court on or about the 31st of May, 1880?" That, I think, was answered, but at any rate, whether it was or not, I think it is not necessary that any further answer should be put in to that. When I say "answered," I mean answered substantially. [His Lordship then read the rest of interrogatory 18, beginning with the words "Declare whether," down to the end.]

That is not answered really, but what the Defendant says is this: "I have, both to the Plaintiff and to other persons"—[His Lordship read down to the end of par. 22 of the answer.]

Now I am not very sanguine that a more precise answer to this question will be of the slightest use to the Plaintiff, because the letter which is referred to did suggest that the Defendant was entitled as devisee at an early date, but I cannot say that it may not be important. It is a plain question which may be easily answered, and therefore, I think, with regard to this latter part of interrogatory 18, beginning with the words "Declare whether, on any and what occasions," to the end, the Defendant must put in a further answer to shew when he first made this claim, though it appears that he did so in fact in May, 1871.

That disposes of two out of the three interrogatories, but now I come to a matter which has been very much argued on this appeal and on a previous appeal, which went to the House of Lords, and that is the answer to interrogatory 21—31 in the former interrogatories. That interrogatory asks about steps and persons in the pedigree of the heir-at-law through whom the present claimant claims, and, with the exception of one question about *Ann Duncan*, the intestate, the Defendant in substance declines to answer that interrogatory on the ground of privilege.

The first question to consider is this: is the ground of protection as claimed good in law? Subject to one point which I must mention we are relieved from difficulty on this question by a previous decision of the House of Lords on practically the same

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interrogatory, in the suit of *Kennedy* v. *Lyell* (1), where *Kennedy* was suing *Lyell* for penalties under the *Act of Bracery*. It was for *Lyell* to shew in that action that his title to the property was no pretence of title, and he asked substantially the same question, in order to obtain an admission of his title on the same footing as in this action; and the House of Lords, affirming the decision of this Court, held that the protection which was claimed by *Kennedy* in that action was good, on the ground that the questions asked were prying into the advice given or the views taken by the legal advisers of *Kennedy* with reference to the result of inquiries as to the pedigree and family of Miss *Duncan*. And this applies just in the same way here, because, although it is asked, apparently as a fact, "Did not she die," and "Who was the heir," and so on, yet really those are not simple facts, but they are the results or deductions drawn by the legal advisers employed for the purpose from the facts relating to the pedigree which came to their knowledge, and subject to one point, the protection is, in my opinion, sufficiently claimed in law. That point is this, that in par. 26 of the answer (the answers being in pars. 25 and 26) what the Defendant says is this: "Except as aforesaid, I have no personal knowledge of any of the matters inquired after in the 21st interrogatory,"—[His Lordship read down to the words "for the purpose of my defence against the aforesaid claims."] Now the only privilege which can be claimed, and such as here the Defendant desires to claim, is what is called "professional privilege," that is to say, that if a man does not employ a solicitor he cannot protect that which, if he had employed a solicitor, would be protected; the reason for this privilege being, as has frequently been stated, that the English law being technical, the greatest facilities ought to be afforded to every one who is involved in litigation to consult a solicitor and to receive from his solicitor communications which shall be privileged, and to enable the legal adviser of the party employing him to make a sufficient investigation, and so obtain the fullest means of ascertaining what advice he shall give as to the course to be adopted, without affording the opportunity to an opponent of prying into those communications, those searches, those responses, which are according to English law all of a confidential character. But then this privilege is confined to that which is communicated to or by that man by or to the solicitors or their agents, or any persons who can be treated properly as agents of the solicitors. We have therefore thought it right, in order to prevent an evasion of what is the proper view of the law by the use of that word "agents," to require that the Defendant shall put in a further affidavit stating whether the agents mentioned were his agents, or whether they were the agents of the solicitors and persons so employed by the solicitor as to be his agents, including such agents as every solicitor's clerk may be said to be, who would all be entitled to the protection given to solicitors. Subject, then, to that alteration, we think that the protection claimed is in law good. But the Plaintiff contends that assuming that the privilege is properly claimed in law, it is not true in fact, and therefore cannot be relied upon. The general rule is undoubtedly this, that in all questions of discovery where you have the oath of the party claiming discovery challenging the oath of the party giving discovery, the oath of the latter is for this purpose conclusive. But what was said here was this, that the practice ought to be the same as regards these answers to interrogatories as it is with reference to an affidavit of documents, and the Plaintiff's counsel referred to the practice which prevails as regards requiring the party who is asked to produce documents, to put in a further answer or affidavit of documents under certain circumstances. Now, first of all, we must see how we have arrived at this practice of requiring an affidavit of documents, and what it is. In former days it was always part of the answer, that is to say, the defendant was interrogated as to certain documents and he put in an answer, but first, by the Act of 1852, which I need not refer to more fully, and then under the *Judicature Act* and Orders, the practice is now different, and now the affidavit as to documents, instead of being part of the answer to interrogatories, assuming there to be an answer, is a separate affidavit.

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(1) 9 App. Cas. 81.

That is under Order XXXI., rule 11 (1). I am referring to the Orders of 1875. [His Lordship read the rule.] With regard to these affidavits of documents the question arose really under the new practice, and it was held that the party making the affidavit could not be cross-examined, the party requiring it could not file affidavits to shew that it was false, and it was held to be conclusive. But if from any documents produced, or any statements in the pleadings, it appears that the party making the affidavit has in his possession documents other than those which are mentioned in his affidavit, the Court requires him to make a further affidavit. The production was only ordered of those documents which he admitted to be in his possession. If there was a probable ground for supposing that he had more, then he was required to make a further affidavit, but that proceeded upon the footing that the oath of the deponent was conclusive as against the party requiring the production. But as the Court was not restricted to requiring the deponent to make one affidavit only, it might require him to make another at any time if there was reasonable probability of there being other documents not mentioned in his former affidavit. In the first case, I think, on the point, or the principal case, of *Noel* v. *Noel* (1) Lord Justice *Turner* put it on the ground, that there might be more than one affidavit, and then if there was a reasonable ground for suspicion that the deponent had more documents in his possession he might be ordered to make another affidavit. What Lord Justice *Turner* says (2) in that case is this: "I do not see anything in the 18th section of the Act (1852) to preclude the Court from requiring more than one affidavit as to documents. If after an affidavit has been made the Court sees anything to raise a reasonable suspicion that the defendant has in his possession other documents relating to the matters in question, I think it may require him to make a further affidavit;" that was the ground—was there reasonable suspicion? if there is that reasonable suspicion a further affidavit will be required. But do answers to interrogatories stand on the same footing? Now that depends on Order XXXI., rules 9 and 10 (3). I will read both through; the first is not so very material. Rule 9 is this: "No exceptions shall be taken to any affidavit in answer." That was

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(1) Rules of 1883, Ord. XXXI., r. 14.

(1) 1 D. J. & S. 468.

(2) 1 D. J. & S. 472.

(3) Rules of 1883, Ord. XXXI., rr. 10, 11.

simply getting rid of the old practice, "but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or Judge on motion or summons." Then Rule 10 is, "If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be." Then an order may be made requiring him to answer by affidavit or *vivâ voce*. So that with regard to an answer to interrogatories, what the Court has to consider is this simply, whether the answer is insufficient, not to go into the question of the truthfulness of the answer, but to see whether it is insufficient or not, and if it is insufficient, then only can it require a further answer. I certainly will not lay down, that if protection is claimed, and it appears from the answer itself, or from that which is made part of the answer, that the facts cannot be such as to justify the claim for protection, or if, from the very nature of the thing as regards which protection is claimed, that protection cannot properly be claimed, the Court is unable to say that is not protected and cannot require a further answer to be given. But then it must not be mere suspicion; that is quite sufficient with regard to documents. But in the case of an answer to interrogatories the Court must be satisfied—clearly satisfied—either from admissions or from other documents, that the oath of the defendant by which he claims his protection cannot be really available for the purpose for which he puts it forward. What we have here, notwithstanding the numerous documents which were relied upon and brought before us, amounts only to matter of suspicion. It might all be explained if the Defendant were here at liberty to make an affidavit, and, as he practically did on this appeal, to explain the circumstances he relied upon. In my opinion where there is a case of mere suspicion the Court is not justified in disregarding the oath of the defendant, by which he claims that which is in law a sufficient protection, and compel him to do—what? Not to put in a further claim for protection, but to put in a further answer to those interrogatories which he has declined to answer on grounds which, if true, are a sufficient protection to him from being required to answer. If he makes a further affidavit as to

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documents, he may do it in exactly the same terms, and then the Court will do no more; but what we are asked to do is to hold that an answer must be given to those questions which he seeks to protect himself from answering upon his oath. In my opinion, before we can so do, we must be positively satisfied either that, from the nature of the subject-matter for which he seeks that protection, the claim cannot be true, or that the claim is entirely falsified by the documents referred to. I do not intend to go into the question how far in the present practice reference can be made to anything which is in the possession of the Defendant, not referred to in his answer but scheduled to his affidavit of documents; because although there are some things in the documents scheduled which are stronger than anything in the answer, yet they all raise the same sort of case of suspicion, which we can see might well be explained.

We must look at what the questions are here. The first interrogatory, 21, is this: "Declare whether you have not caused certain searches and inquiries to be made as to the several matters in the following sub-sections respectively inquired for, or some and which of them, and whether and where and how and from whom you have received any and what information touching all or some and which of the matters hereinafter inquired for, and whether you believe such information to be true in any and what respect." I must pause there for a moment to say that I never saw such an interrogatory before in the course of my experience. What is the answer? As I have said, it is sufficient in law, and I will not read it therefore in detail. It is in substance this, that the only searches and inquiries he has made have been made by his professional advisers for the purpose of defending his estate against the claims of the Plaintiff and others who are also attacking this estate, which was derelict, (or at least nobody could establish a title to it), and of which the Defendant has possession. That answer must be read reasonably. It is not that he never made any inquiries about this estate or about the heirship to it, but that he never made any inquiries with reference to the particular questions asked, although if read strictly the answer may go perhaps a little further. The information he acquired was information as regards those particulars only, and which information he seeks to protect. One must remember here that the Plaintiff is claiming through the paternal line of the intestate, and that there is another claimant, Mr. *Buchan*, who claims through the maternal line, and a great deal of the Defendant's inquiries might have been made about Mr. *Buchan's* pedigree, which would not throw any light on the claim of the present man, claiming through the great-grandfather of the intestate. I mention that for this reason, that one of the letters which were justly, I think, relied on, was written by Mr. *Kennedy* to Mr. *Buchan*, who claimed through the maternal line of the intestate, in which he says that "he is making minute inquiries," and that he does not think Mr. *Buchan* has much chance. The statement that "he is making minute inquiries" about the heirs might raise a suggestion that he had found out something about the pedigree in support of the facts upon which the Appellant insists; but, as I have said, we must not have mere suspicion in order to enable us to set aside the protection claimed against the interrogatory, we must have proof which is satisfactory to our minds that the claim cannot be true. I have mentioned *Buchan* as a claimant. There were pleadings in the action in the Court of Session in *Scotland* upon which Mr. *MacClymont* relied; and the Defendant here had instituted proceedings there as pursuer, stating that he did not know who the heir-at-law was. He may not have made those inquiries—it does not at all follow that he did. A man who says he has no knowledge who the heir is might so instruct his solicitor or counsel, but it does not follow that he has made such inquiries as to falsify the protection claimed, and shew that he could not possibly, consistently with truth, make that claim. In my opinion there is no case made here for falsifying the protection claimed so as to enable the Plaintiff to say that the claim to protection is not true.

There was another point which was very much urged, but my opinion upon this point renders it unnecessary to deal with it, that is, how far the Defendant is protected from answering the questions on the ground that it was part of his own case. That I need not now deal with. Before I leave this part of the appeal, however, I must deal with one suggestion of Mr. *MacClymont*, that if we hold the answer to be in any way insufficient, we ought

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simply to make a declaration to that effect, leaving him to take such steps as he might be advised. I suppose he would for that purpose rely on one of the Orders in order to take it *pro confesso*, or to have a judgment in default of answering. In my opinion that would not be the proper course to take. The Court has power, no doubt, if it sees that a defendant is refusing to give discovery, to say the parties ought to be left to take such steps as may be suggested; but here, although we do hold that in some particulars there ought to be a further answer, that, in my opinion, is not the proper view to be taken of this answer, and that the only true course is this: to assume that the Defendant will ask for further time, to give him that further time, and to require him to put in a further answer to those interrogatories which have not been sufficiently answered at present.

That disposes of the question of the answer to the interrogatories.

Then we come to the appeal against the second order, which is the one as to production of documents—and there the Defendant has claimed protection for certain documents. The only class of documents as to which any question was raised, subject to what I shall mention, were those numbered 5 and 7 in paragraph 4 of his affidavit. There was this contention raised, which I have not forgotten: that the Defendant had waived his privilege, and therefore could not claim it at all. That, in my opinion, was entirely fallacious. He had done this, he had said, "Whether I am entitled to protect them or not I will produce certain of the documents for which I had previously claimed privilege—I will waive that, and I will produce them," but that did not prevent him relying on such protection with regard to others which he did not like to produce. It is not like the case of a man who gives part of a conversation and then claims protection for the remainder, and we think there is no ground for the contention that there has been here waiver of privilege. The documents numbered 5 are these, "Copies of entries in registers and public records, and of other original documents;" then "photographs of tombstones and houses," and then he claims protection for those, and states, "that all the said documents were made, prepared, and procured"—[His Lordship read the rest of paragraph 4 down to the words "solely for that purpose."] Now I think it was almost conceded that the case was a new one upon this point, but certain authorities were relied upon by Mr. *MacClymont* in argument, which he says establish that he is entitled to production of those documents. *Wright* v. *Vernon* (1) was one of those cases which was most commented and relied upon; but there the documents in question were documents which had not been procured by professional advisers, but apparently, as far as the answer claimed any protection for them, they had been obtained by the defendant himself (2), and therefore there is a complete difference between that case and this. So in *Storey* v. *Lord Lennox* (3) the same distinction is to be found, and here, I think, I may refer to a passage in Vice-Chancellor *Kindersley's* judgment in *Wright* v. *Vernon* (4): "Lord *Lennox*, who was the party interested in the policy, and claiming payment, had had personal communications with various individuals, for the purpose of obtaining from them information relating to the insurers; that was information obtained from strangers, and for the purpose of the contest; yet he was obliged to produce the documents." He quotes that as explaining the principle on which he is deciding, and it explains both cases; that is that when a man will act for himself, and will not do that which is the very ground of privilege, viz., act by a solicitor, whatever he learns, when the proper interrogatories are put to him he must produce or disclose it. *Balguy* v. *Broadhurst* (5) was another case which was referred to, but that was decided merely on the ground that the privilege was not properly claimed because the claim was put in informal language, that "some of the documents had been procured by his solicitor since the institution of the suit, and for the purpose of his defence to it; and the same were, as he was advised and insisted, confidential communications."

What ought we to do here? Here is a litigation about pedigree and the heirship to a lady who died many years ago; and it is sworn by the Defendant that for the purpose of defending himself against various claimants he has made inquiries, and

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(1) 1 Drew. 344.

(2) This appears more clearly from the report in 22 L. J. (Ch.) 447.

(3) 1 My. & Cr. 525.

(4) 1 Drew. 351.

(5) 1 Sim. (N.S.) 111.

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that he has obtained every one of those documents for the purpose of protecting himself, and that he has got them, not himself personally, but that his solicitors have got them, for the purpose of his defence, for the purpose of instructing his counsel, and for the purpose of conducting this litigation on his behalf. Now no case has been quoted where documents obtained under such circumstances have been ordered to be produced. In my opinion it is contrary to the principle on which the Court acts with regard to protection on the ground of professional privilege that we should make an order for their production; they were obtained for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required documents, although perhaps *publici juris* in themselves, to be produced, because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might shew what his view was as to the case of his client as regards the claim made against him. There is no case, as I have said before, which is exactly in point, but *Walsham* v. *Stainton* (1), though different in its circumstances, somewhat illustrates the principle to which I am referring, because there, when that case came before Vice-Chancellor *Wood*, he protected the records and extracts from books which had been made by an accountant for the defendants, who had collected together a number of entries, because the extracts, when put together, shewed the view which he and the solicitor of the defendants took of the particular fraud which they were there investigating, and the Judge considered that to order the defendants to produce them would be not only giving production to the parties who were asking for production, but giving them a clue to the advice which had been given by the solicitor, and giving them the benefit of the professional opinion which had been formed by the solicitor and those who had acted in a professional capacity for the defendant.

In my opinion, therefore, in this case, without saying what ought to be done if there were any different case made before the

(1) 2 H. & M. 1.

Court with regard to documents like these, it would not be in accordance with the rules which have guided this Court in deciding what is professional privilege in regard to the production of documents, to order their production. And I think that the Vice-Chancellor was right in declining to order any of these documents to be produced.

As regards the question of costs, I must say that I do not look with any favour upon these interrogatories. I think they are oppressive, and I think a great many of them cannot produce any result to the party filing them. Nor do I like the way in which the answer is framed; it is not open and straightforward, which is always the best policy in defending any case. I therefore do not look with favour upon the conduct of either of the parties as regards the question we have here to decide, nor am I very well satisfied in my own mind that although we have ordered further discovery to be given, that is really and substantially what the Plaintiff wants. In my opinion, therefore, the proper order will be to give no costs of the appeal.

BOWEN, L.J.:—

I agree substantially and almost absolutely with everything that has fallen from the Lord Justice, and I shall not, therefore, travel over the whole of the ground he has covered, but confine myself to making a few remarks upon the points of law. I will first say I do not think I have often seen an affidavit in answer to interrogatories which pleases one less than the affidavit which has been put in here on the part of the Defendant. I will not say it seems to me uncandid, because I am not prepared to offer any opinion as to its truthfulness or untruthfulness—but I think there has been an attempt to embarrass, and if that were an attempt which could have succeeded, I think we should have ordered a further answer on points where a further answer will not now be required. I will take as an illustration paragraph 27 of the answer as to whether the Defendant had caused affidavits to be filed in another suit. Now giving the Defendant the benefit of the view that he was perhaps justified there in merely copying his answer as to filing the affidavits, and adding that he had so sworn under some misapprehension, and giving him the full benefit of that explanation, as the learned Lord Justice has done, I still think it is embarrassing. I think myself when an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matter as part of it, that the answer is insufficient, and that the proper course to pursue is to ask that a further answer shall be made; and on this ground, that even if it may be dealt with in another way, as by having the whole of the affidavit taken off the file, that would be a cumbrous and expensive mode of curing the evil. I think an answer is not sufficient which is so involved and so insufficient in the particular statement as not to be capable of being used. In my opinion that is very well covered by authority on the Common Law side in a case which has been followed as good law ever since, that is the case of *Peyton* v. *Harting* (1), which lays down that answers to interrogatories may be insufficient within the meaning of the *Common Law Procedure Act*, sect. 54, if impertinent or otherwise objectionable in their matter under the circumstances. The Master of the Rolls, then *Brett*, J., says there (2): "There must be some matter of supererogation which would make an answer insufficient. Whether in any particular case there is such matter as to render the answer insufficient, which, without it, would be sufficient, is a question for the discretion of the Judge at Chambers." And Mr. Justice *Keating* says in the same case (3), "If the Judge is satisfied that the answers contain matter which is improper or impertinent, as destroying the effect of the answers or introducing irrelevant topics, all which is matter for his discretion, he has jurisdiction," *i.e.*, to require a further answer.

And in this case I should have thought that a further answer ought to be made, but for one consideration, which seems to me to be conclusive. What is the object of interrogatories? Why it is, of course, to get discovery of matter which can be used for the purpose for which the statute intended it to be used. If, indeed, the Defendant had framed his answers in such a way as to prevent the Plaintiff from using them at the trial, I should say he must answer further; but he cannot do that now however much he may desire it, because by Order XXXI., rule 24, "Any party may at the trial . . . use in evidence any one or more of the answers, or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer." Accordingly the Judge at the trial will know perfectly well how to deal with this if there is any unfairness with regard to using the residue of the answer which the Defendant has sought to put upon the Plaintiff, and he will only allow such parts of the answer to be used as contain a direct answer to the interrogatories. I pass over what the Lord Justice has said as to the other interrogatories to which we have directed an answer to be made. I agree that there ought to be an answer in each of those cases; they are small matters, but still in those respects there has been a failure to answer.

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(1) Law Rep. 9 C. P. 9.

(2) Law Rep. 9 C. P. 11.

(3) Law Rep. 9 C. P. 10.

And now I come to the question which has taken up so much time, that is to say, the claim of privilege which has been set up by the Defendant. I agree that he must make a further answer as to the allegation that the information has been procured by "his solicitors or agents." That will not do, though I think that might have been a slip, and might have been so considered if it had not been for the general tenor of the other answers. But as to the rest, it seems to me, if his allegations are true, his claim to privilege will be covered by the decision in the House of Lords, and it will be good, because he will then have stated upon oath facts upon which he ought to be excused. But, says Mr. *MacClymont*, for the Plaintiff, "Although he has insisted upon oath on facts upon which, if true, he ought to be excused, I can shew there is a cloud of suspicion about the statement on oath which ought to induce the Court to order a further affidavit to be made upon the point." The learned Lord Justice *Cotton* has expressed most happily and lucidly, if he will forgive my saying so in his presence, the law upon this subject. I pass by the question of the affidavit of documents, and the law upon that subject, because we are now dealing with the answer to interrogatories, and that depends on rules 10 and 11 of Order XXXI. What ought to be held to displace the statement on oath, upon which, if true, privilege is claimed? It ought not to be open to the opposite party to raise a controversy which, if unsupported, the Court has no means of deciding. It may be that the admission may be so clear, either upon the answer of the defendant himself, or upon the other facts of the case, that the Court can arrive at the conclusion that it is a misstatement either made deliberately or *per incuriam*, but in laying down the line of definition or demarcation, which should teach us to what we may look in particular cases, and to what we may not, I think the true canon to be always borne in mind, is this: that you are appealing to the oath or conscience of the other side, and that you cease to appeal to his oath the moment you begin to contest his accuracy. Therefore, nothing ought to make us order a further answer on the ground that it is insufficient, except something which is very clear indeed. Now be it observed that it is impossible this answer can be so worked as to cause injustice. There is an ample means of obtaining further information by an application for discovery. If the Plaintiff can satisfy the Judge in Chambers that there is reason for thinking that his adversary has answered hastily or loosely, or untruthfully, he can interrogate him specifically over and over again by getting leave to put further interrogatories; and that is the course which ought to have been pursued in this case. Instead of our time having been occupied by hearing the learned argument of Mr. *MacClymont* as to the way in which we should deal with this answer, and whether it should be treated as insufficient or not, if Mr. *MacClymont* had any cause of complaint, or had any case to make out upon the documents to which he has called our attention, he could have gone to Chambers and made such an answer to this affidavit as would have satisfied the Judge, and if the Judge had thought fit, there would have been a further answer obtained. That is the course very frequently adopted at Common Law, both as regards affidavits of document, and answers to interrogatories.

Therefore, it seems to me, in this case what the learned Lord Justice has said is not only clear law, but that it cannot possibly work injustice in this case.

Then comes the point as to documents, and as to the documents, I agree with everything that has been said by the Lord Justice. We are not dealing now with documents which the party has procured himself; we are dealing with documents which have been procured at the instigation of a solicitor; and, bearing in mind the rule of privilege which the law gives in respect of information obtained by a solicitor, it seems to me we cannot make the order asked for by Mr. *MacClymont* without doing very serious injustice in this case. A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or *virtuoso*, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them. I entirely agree, therefore, with what has been said, and without saying what ought to be done in another case, I am satisfied that in this case we could not make the order asked for without infringing the principle on which the Court acts, nor is it necessary to say what would be done as to any particular document if a right to inspection were made out.

FRY, L.J.:—

I agree with the reasons and conclusions which have been stated by my learned brethren with certain reservations on two minor points. I am not prepared to express at the present moment any opinion upon the two points referred to by Lord Justice *Bowen*. In the first place I do not desire to express any view as to whether the embarrassing character of the answer may have rendered it insufficient. The point does not appear to me in the present case to require decision, but I think the Defendant in putting in this answer has endeavoured to embarrass the Plaintiff, and I think that he has failed in that endeavour.

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Therefore, I do not think it necessary to consider how far, if he had succeeded, it would have been held to be insufficient. Again, I do not desire to consider the question whether a repetition of interrogatories would in the present case have been the most desirable course. With those two exceptions on the minor points I have mentioned, I concur in the judgment of my learned brethren. I cannot but agree in what they have said with regard to the spirit and manner in which this litigation has been conducted on both sides. I have rarely come across a case in which greater folly has been shewn than that which has been manifested in the way in which this case has been conducted. There has been a competition of demerits on both sides; each has striven to use the practice and forms of the Court to the utmost for the purpose of aggravating and annoying the other, and they have each been successful to a considerable extent, and the result has been a most incredible waste of money, which will have ultimately to be borne by one or other or both of the parties. If they persist in such a course no doubt they will be very successful in annoying one another. I agree in the conclusions at which the learned Lords Justices have arrived.

Solicitor for Appellant: *J. Balfour Allan.*

Solicitors for Defendant: *Rooke & Sons,* agents for *Earle, Sons, & Co., Manchester.*

M. W.

In re DOMINION OF CANADA PLUMBAGO COMPANY.

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PEARSON, J.
Feb. 1, 8, 15.
C. A.
April 22.

Company—Liquidation—Costs of Successful Litigant—General Costs of Liquidation—Priority of Payment.

In the winding-up of a company the liquidator changed his solicitor. The first solicitor claimed to be paid his costs. The liquidator set up in defence that he had, in pursuance of an order of the Court, paid away part of the assets in discharging the costs of an unsuccessful attempt to settle an alleged shareholder on the list of contributories, and that the only remaining assets amounted to £9, which was quite insufficient to pay the applicant, and which he claimed to retain for costs out of pocket:—

Held (affirming the decision of *Pearson*, J.), that the successful litigant whose costs were ordered to be paid by the liquidator, was entitled to immediate payment of those costs in priority to the general costs of liquidation including costs of realization; and that the remaining assets, amounting to £9, must be apportioned equally between the liquidator and the applicant.

In re Home Investment Society (1) followed; *In re Dronfield Silkstone Coal Company* (2) not followed.

The order giving the costs to the successful litigant directed that they should be paid by the official liquidator, and that he should be at liberty to retain them out of the assets of the company:—

Held, that this form of order gave the official liquidator the right to repay himself the costs out of the assets in priority to all other creditors.

THIS was a motion on behalf of *Edward Beall*, the late solicitor for the official liquidator of the *Dominion of Canada Plumbago Company*, now in the course of being wound up compulsorily, that an order made in Chambers, dated the 25th of June, 1883, might be varied or discharged, and that *J. H. Tilley*, the official liquidator of the company, might be ordered to pay to the applicant £167 8*s.* 5*d.*, the amount found due to him by the Taxing Master's certificate of the 23rd of May, 1883, or such other sum as the said *J. H. Tilley* should have had in the *Bank of England* to the credit of the official liquidator of the company, and that the costs of this application and of the order of the 25th of June, 1883, might be paid by *J. H. Tilley* to the applicant.

The facts of the case were these: *E. Beall* acted as solicitor for the official liquidator from the date of his appointment until August, 1880, when the liquidator changed his solicitor.

(1) 14 Ch. D. 167.

(2) 23 Ch. D. 511.

The assets of the company were insufficient to pay the costs incurred in the course of the winding-up. The only assets come to the hands of the liquidator, exclusively of certain sums paid away by him and not brought in question upon this motion, consisted of a sum of £35 17*s.* 11*d.*, which had been realized by a sale of the company's stock-in-trade.

After the change of solicitors an unsuccessful attempt had been made to settle a person named *Kirby* on the list of contributories, and an order was then made that the official liquidator should pay *Kirby* the taxed costs of the application, and that he should be at liberty to retain the amount of the costs out of the assets of the company. These costs had accordingly been taxed at £23 5*s.* 2*d.*, and the liquidator having paid that amount out of the £35 17*s.* 11*d.*, and some other small sums, there remained only £9 8*s.* in his hands.

The applicant then took out a summons in Chambers, asking that the liquidator might be ordered to pay the amount of his taxed costs, and that summons having been dismissed with costs, the present motion was made to vary or reverse that order.

This motion was partially argued in November, 1883, when it appearing that the case of *In re Dronfield Silkstone Coal Company* (1), which was relied upon by the applicant, was under appeal, the motion was ordered to stand over until that case should have been decided by the Court of Appeal. The appeal, however, was subsequently withdrawn on terms, and the present motion was therefore brought on for argument.

Dunham, in support of the motion :—

The applicant's costs consist partly of the costs of realizing the assets and partly of the general costs of the winding-up. The costs of realizing the assets must be paid out of the assets before any costs of any internal litigation, and the general costs of the winding-up must be paid *pari passu* with costs of internal litigation. This was decided by the case of *In re Dronfield Silkstone Coal Company*. The liquidator was therefore wrong in paying *Kirby's* costs, which were costs of internal litigation, without providing for the applicant's costs, and he must put the applicant in

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(1) 23 Ch. D. 511.

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the same position in which he would have been had the assets been properly administered.

Seward Brice, for the Official Liquidator:—

The costs of all litigation between the company and outside persons when ordered to be paid by the company or the liquidator, must be paid at once in priority to other costs or claims out of the assets. *Kirby's* costs were therefore properly paid by the liquidator. It is submitted that this principle is established by the case of *In re Home Investment Society* (1), and the cases of *Ex parte Smith* (2), and *Bailey and Leetham's Case* (3), referred to in the judgment. The decision in the *Dronfield Silkstone Coal Company's Case* (4), so far as it directed the costs of the litigants with the company and the general costs of the winding-up to be paid *pari passu*, was inconsistent with the other decisions. The latter costs ought to have been postponed to the former.

He also referred to *In re Massey* (5) and *Ex parte Watkin* (6).

Pearson, J., intimated that he did not agree with Mr. Justice *Chitty* in *In re Dronfield Silkstone Coal Company*, and called for a reply on that point only.

Dunham, in reply:—

There is one fund, that is, the assets realized, available for payment of all the costs incurred in the winding-up. If the fund is deficient, all claims must abate rateably, for the policy of the Winding-up Acts is *pari passu* distribution of the assets amongst all persons having claims upon them: in the case of internal litigation, a successful litigant getting his costs out of the assets has no charge upon them entitling him to priority of payment, and no superior right to the general costs. In the case of external litigation it is different, because the litigant is outside the winding-up, and there is nothing to affect his ordinary right to be paid costs in full. But an internal litigation takes place under and in consequence of the Winding-up Acts, and therefore subject to all the incidents of those Acts; and where, therefore, a successful litigant under those Acts gets his costs out of the assets he is only entitled to be paid in a due course of administration according to the policy of the Acts. Further, if he were entitled to any priority of payment according to time, he would really have a charge upon the assets, which is not the case. At any rate, the costs of realization ought to be paid before anything, for without their being incurred there would be no fund at all, and they are, in fact, a charge upon the fund.

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(1) 14 Ch. D. 167.
(2) Law Rep. 3 Ch. 125.
(3) Ibid. 8 Eq. 94.
(4) 23 Ch. D. 511.
(5) Law Rep. 9 Eq. 367.
(6) 1 Ch. D. 130.

Feb. 1. PEARSON, J.:—

This is an application made by Mr. *Beall*, who was originally solicitor to the liquidator of this company, for payment, so far as the assets are sufficient, of what is due to him in that capacity. He had at an early stage ceased to be the solicitor, and other gentlemen became the solicitors to the liquidator. The assets in this case are very small, and there is no doubt whatever that there is not sufficient to pay either the original solicitor or the subsequent solicitors in the liquidation. The liquidator pleads that he has already administered the assets, and the question arises whether or not, in the administration of the assets, he is right in saying that he was bound to pay, as he did pay, a litigant of the name of *Kirby* his costs, in priority to the general costs of the liquidation? If he were right in making that payment then, with the exception of the sum of £9 8*s*., which I will mention afterwards, there is nothing out of which Mr. *Beall* can be paid. If, on the contrary, the liquidator were wrong in paying Mr. *Kirby*, and if Mr. *Kirby* ought to have been paid *pari passu* with the general costs of the liquidation, then the liquidator ought to have, and must be deemed to have, a larger sum in his hands than he has accounted for. It appears, by the proceedings of the case, that the liquidator endeavoured to settle Mr. *Kirby* on the list of contributories. He failed in that contention, and an order was made in the usual form: "This Court does not think fit to make any order upon the said application, but doth order the official liquidator to pay Mr. *Kirby* the costs of the application, to be taxed by the Taxing Master." It raises, therefore, the question which has been raised in other cases, as to the priority of payment under an order of that kind, where there has been a contentious application, for which the liquidator has been ordered to pay. There have been two cases in which this question has been determined. One case was *In re Home Investment Society* (1) decided by Vice-Chancellor *Malins*, in which he came to the conclusion that under an order of this sort the party who was successful was entitled to be paid his costs in priority to the general costs of the liquidation. The other case was before Mr. Justice *Chitty*—*In re Dronfield Silkstone Coal Company* (2)—in which he decided that such costs were to be paid *pari passu* with the general costs of the liquidation. That being the case, there being, as I consider, two conflicting decisions of two Judges, although Mr. Justice *Chitty* (speaking, as was natural, with that cautious reserve which he would be sure to use towards a deceased Judge) tries, to my mind, to shew that there is much less opposition between his decision and the decision of Vice-Chancellor *Malins* than might be supposed to exist, I come to the conclusion that they cannot stand together, and I am obliged to form my own opinion on the case, and must do the best I can where I have two Judges differing about the matter. Now I must confess that but for the conflicting decisions of these two Judges, I myself should have thought that the case was reasonably clear, both upon principle and authority. First, let me look at it on principle. Formerly an action would have been brought in the name of the company, and the company bringing an action against a person outside the company, if the action were unsuccessful on the part of the company, there would have been judgment for the defendant and an allocation of costs, and but for the 163rd section of the Act of 1862 the defendant in that action would have been able to issue execution against the company. Whether that 163rd section applies to such a case as this I do not intend to express any opinion, having regard to the fact that when that question was before the Lord Chancellor *Cairns* he cautiously abstained himself from expressing any conclusion, but I cannot conceive that in such a case the costs of the party who has succeeded at law could have been costs to come in *pari passu* with the general costs of the liquidation. Under the present system the liquidator is the nominal plaintiff, not the company, and the general form of order

(1) 14 Ch. D. 167.

(2) 23 Ch. D. 511.

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has been in the form in which this order was made. Does it make any difference? I think not. I cannot imagine that because the Court orders the liquidator to pay out of the assets of the company, that that gives the party to the action who has been successful any lesser right to be paid his costs than he would have had under the former system; and to my mind it is monstrously unfair that such a doctrine should be held, because the result would be this, that in an early stage of the liquidation there might be a most unfounded and vexatious action brought against a stranger, that action might have had its necessary result in being dismissed with costs, and yet if this doctrine is to be maintained, the costs are only to be paid out of the assets *pari passu* with the general costs of the liquidation. All those assets might disappear practically in the subsequent winding-up of the company, and the stranger who had been unnecessarily and improperly vexed would be left without any remedy whatever for his costs. Now I conceive that Lord Chancellor *Cairns* and the late Lord Justice *James*, when Vice-Chancellor, in effect decided this question. In the former case—that of *Ex parte Smith* (1)—Lord *Cairns*, after stating the nature of the application said, "Thus the matter would have stood if the 163rd section had not been in the way. But it is said that the 163rd section makes the execution altogether void. I should be sorry to have to decide to that effect without very much more consideration, for the result of such a decision would be extremely important as regards the position of companies when they are being wound up. The consequences of the decision would be, that a liquidator, being armed with powers to bring whatever actions he thinks fit, might bring any number of groundless actions, which would be defeated one after another, and judgment would go for the defendant, and yet the defendant, when he came to levy for his costs by virtue of his judgment, would be told that his execution was void, and that he must go in and take the chance of obtaining a dividend under the process of winding-up." Now I consider that to be a positive decision of the Lord Chancellor, that when the company is ordered to pay the costs, those costs are not to be paid *pari passu* with the other creditors, but are to be paid forthwith, and that the successful litigant is to be put in the same position as if he had got judgment at law and had been allowed to issue execution.

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(1) Law Rep. 3 Ch. 125.

Lord Justice *James* when sitting as Vice-Chancellor in *Bailey and Leetham's Case* (1), in which a claimant brought an action against a company in liquidation and obtained a verdict with costs, said this: "Upon general principles, unless the Court is bound by some express enactment or order to the contrary, it appears to me that a company in winding-up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly or defended fruitlessly, then the estate, that is to say, the other creditors, ought, like everybody else to be fixed with the costs to which they have improperly and unnecessarily put their opponent." The Vice-Chancellor then expressed his opinion that the action had been improperly resisted on behalf of the assets, and he considered that the assets ought to pay the costs of that improper resistance.

Now in this case there was an attempt made by the liquidator to place Mr. *Kirby* on the list of contributories. That attempt failed, and Mr. *Kirby* was therefore a stranger to the company. The Court ordered that his costs should be paid out of the assets, and I am of opinion that that meant an immediate payment, if there were assets in the liquidation out of which he could be paid, and therefore, so far as regards the payment by the liquidator in this case, the payment was perfectly right.

Feb. 8. The case was again mentioned to day.

Dunham:—

Does your Lordship's judgment apply only to the general costs of the winding-up or the costs of realization also?

PEARSON, J.:—

To both. I decide that the liquidator was right in paying *Kirby's* costs immediately out of funds then in hand without providing either for costs of realization or general costs of winding up.

(1) Law Rep. 8 Eq. 94, 97.

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The case was then argued as to the sum of £9 8*s*., retained or paid by the liquidator for petty expenses.

Dunham:—

The liquidator is entitled to no remuneration until all costs are paid : *In re Massey* (1). If this being an out of pocket payment is not within that rule, then it can only be paid *pari passu* with the solicitors out of pocket expenses, which in this case are over £40. The fact that the liquidator has received and retained the money can make no difference, for he gives credit to the assets, and has no lien.

Seward Brice, for the Official Liquidator:—

The liquidator is entitled to be paid and to retain out of any moneys in hand his actual disbursements out of pocket; and in any case the amount now in dispute, £9 8*s*., if it be applied for costs must be apportioned between Mr. *Beall* and the present solicitors of the liquidator, whose bill of costs is unpaid and is considerable.

Feb. 15. PEARSON, J.:—

I hold that the sum of £9 8*s*. retained by the liquidator must be apportioned between him and the applicant, and I award £5 to the applicant, and the balance to the liquidator. The liquidator must therefore pay £5 to the applicant, and the applicant, having failed on the principal point, must pay the costs of the motion.

T. W. G.

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From this decision Mr. *Beall* appealed. The appeal was heard on the 22nd of April, 1884.

Dunham, for the Appellant:—

Mr. Justice *Pearson* treated the order of Mr. Justice *Fry* as directing the official liquidator to pay *Kirby* out of the assets of the company. That was not the effect of the order; the liquidator was directed personally to pay *Kirby*, and he then became a creditor on the assets for what he had paid *Kirby*, and cannot rank

(1) Law Rep. 9 Eq. 367.

before Mr. *Beall*, who is also a creditor. Whether the two cases commented on in the Court below, *In re Home Investment Society* (1) and *In re Dronfield Silkstone Coal Company* (2), are conflicting or not, neither of them applies to the present case, because in both those cases the order was to pay the costs out of the assets. Here the official liquidator has only a claim against the company for indemnity, and if he is not to be postponed to Mr. *Beall's* claim for work done for the company he can only claim *pari passu* with him: *In re Massey* (3); *Ferrao's Case* (4). At all events Mr. *Beall* is entitled to the whole of the £9 8*s*. in the hands of the official liquidator.

Cookson, Q.C., and *Seward Brice*, for the official liquidator, were not called on.

BAGGALLAY, L.J.:—

In this case an order for winding up the company was made in February, 1880, and Mr. *Beall* was appointed by the official liquidator his solicitor in the winding-up. He continued to act as solicitor till August, 1880, when another solicitor was appointed. The solicitor was *primâ facie* entitled to be paid his costs out of the assets of the company. The assets did not amount to more than £123, and after certain necessary payments they were reduced to £35 17*s*. 11*d*. The question to be decided comes to this, whether the sum paid for costs to *Kirby* was rightly retained by the official liquidator out of the assets. The official liquidator tried to place *Kirby* on the list of contributories, but failed to do so, and it was ordered that *Kirby* should receive his costs. The form of the order was that the official liquidator should pay *Kirby* his taxed costs of the application and should be at liberty to retain them out of the assets. The costs were taxed at £23 5*s*. 2*d*. and were paid to *Kirby*. Mr. *Beall* claims priority over the official liquidator for the payment of his bill of costs out of the assets. In my opinion the order of Mr. Justice *Fry* is conclusive of the question. The order for payment of costs by the official

(1) 14 Ch. D. 167.
(2) 23 Ch. D. 511.
(3) Law Rep. 9 Eq. 367.
(4) Ibid. 9 Ch. 355.

liquidator may be drawn in different forms. In the case cited, *In re Home Investment Society* (1), the costs were ordered to be paid out of the assets of the company. Here the costs were ordered to be paid by the official liquidator, and having paid those costs to *Kirby* in the performance of his duty he was to be at liberty to recoup himself out of the assets. In my opinion that gives to the official liquidator priority over all other creditors, and Mr. Justice *Pearson* was right in holding that he was justified in retaining the amount of those costs out of the assets.

With respect to the remaining sum of £9 8*s*., it would be monstrous if the Court were to entertain an appeal for such a sum. The Judge adopted the plan of apportioning this amount, and I am of opinion that he had power to do so under the 110th section of the *Companies Act*, 1862, which gives a wide discretion to the Court in determining the priority of costs in a winding-up. The appeal fails and must be dismissed with costs.

COTTON, L.J.:—

I am of the same opinion. This appeal is brought by Mr. *Beall*, who was formerly the solicitor of the official liquidator. The official liquidator changed his solicitor in August, 1880. Mr. Justice *Pearson*, in exercise of his powers under sect. 110 of the *Companies Act*, 1862, held that the small sum of £9 8*s*. remaining in the hands of the official liquidator was the only sum free to be dealt with towards paying Mr. *Beall's* costs. I am of the same opinion. I understand that he dealt with that sum as between the two solicitors, and apportioned it in accordance with the usual practice where there is nothing to give priority. There is no priority here, and I think he was right in so doing.

But it was also contended that the sum of £23 5*s*. 2*d*. ought to have been dealt with by the Court as well as the £9 8*s*. I think that contention is wrong. The learned Judge treated the order of Mr. Justice *Fry* as an order giving a present right to the official liquidator, as soon as he had paid that sum to *Kirby*, to retain it out of the assets. I think he was right in doing so. It

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(1) 14 Ch. D. 167.

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would have been wrong for a Judge, acting under sect. 110 of the *Companies Act* to give the solicitor a priority for his costs over the official liquidator in respect of expenses properly incurred by him.

LINDLEY, L.J., concurred.

Solicitors: *Beall & Co.; Bolton, Robbins, Busk, & Co.*

M. W.

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[1883 N. 1366.]

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Feb. 8.
C. A.
April 30; *May* 1.

Light—Alteration of Windows—Interim Injunction—Balance of Convenience.

The Plaintiffs being the owners of an ancient building which had numerous windows pulled it down and rebuilt it. A few of the windows in the new house included the space occupied by ancient windows, but were of larger dimensions; several others included some portion of the space occupied by ancient windows; and in some cases the spaces occupied by ancient windows were entirely built up in the new house. The Defendants commenced to build a house on the opposite side of the street, which if completed according to the plans, would materially interfere with the light coming to the Plaintiffs' windows.

On a motion for an interim injunction the Court, holding that the Plaintiffs had shewn an intention to preserve, and not to abandon, their ancient lights, and that there was a fair question of right to be tried at the hearing, and considering that the balance of convenience was in favour of granting an injunction rather than of allowing the Defendants to complete their building with an undertaking to pull it down if required to do so, granted an injunction till the hearing.

The order of *Bacon*, V.C., affirmed.

Hutchinson v. *Copestake* (1) and *Tapling* v. *Jones* (2) considered.

THE Plaintiffs in this action were lessees for a long term of years of a block of buildings four stories high, known as *Great Winchester Street Buildings*, in the city of *London*. A portion of the buildings faced *Little Winchester Street* towards the east, and were let to bankers, merchants, solicitors, and others.

In the front, facing *Little Winchester Street*, were numerous windows; some being on the ground floor, some on the first floor, and some on the second floor.

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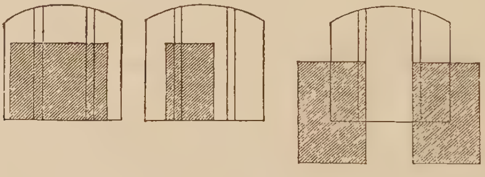
(1) 9 C. B. (N.S.) 863.

(2) 12 C. B. (N.S.) 826; 11 H. L. C. 290.

Little Winchester Street is a narrow street only about twelve feet wide, and the Plaintiffs complained that the Defendants threatened and intended to build a lofty pile of buildings on the opposite side of the street which would obstruct the light coming to the above-mentioned windows in the Plaintiffs' building.

The Plaintiffs' building had been recently erected, not having been constructed till the year 1867, but the building on the site of which it was erected had ancient windows looking into *Little Winchester Street.* There were forty-four windows in the old building, and forty-two in the three lower floors of the new building. Photographs had been taken of the old building before it was pulled down as well as of the present building, from which it appeared that a few of the new windows on the ground floor were substantially in the same position as the old windows, although they covered a larger space; but by far the greater number of the new windows occupied only part of the spaces covered by the old windows and extended considerably beyond them on one side or the other. Some of the new windows were in entirely different positions from any of the old ones, and some of the old windows were altogether built up.

Annexed is a sketch of two of the new windows most nearly identical with the old windows and one of the others, the position of the old windows being shaded.



The foundations of the Defendants' proposed building had been laid, but the walls had not been raised above the surface.

The Plaintiffs moved on the 8th of February, 1884, before Vice-Chancellor *Bacon*, for an injunction till the hearing.

Hemming, Q.C., *Byrne*, and *C. J. H. Corbett*, for the Plaintiffs:—

Upon the Plaintiffs' premises there used to stand a number of buildings of very various heights, to which there was a large access of light; and some of these lights and parts of many others are preserved in the Plaintiffs' new buildings. The Defendants mean to raise their new buildings to the height of the highest of the Plaintiffs' old buildings.

The defence is practically this: "No doubt we are darkening your lights, but as you have enlarged your windows you are getting a great deal more light than you had in 1867–70; and the old light of yours which we are obstructing is more than compensated for by the new light you are getting." The Defendants also say that when we, the Plaintiffs, pulled down in 1867 the houses, opposite to the sites of which the Defendants are now building, a gentleman named *Gregg*, an architect employed as a surveyor by the Defendants' predecessors in title, looked over the Plaintiffs' premises, and "concluded" that the Plaintiffs meant to abandon their ancient lights. This the Plaintiffs deny, and say that so far from abandoning they did their utmost to preserve plans shewing the position and size of those ancient lights: *Tapling* v. *Jones* (1).

Marten, Q.C., and *Joseph Beaumont*, for the Defendants:—

This is not a case for an interlocutory injunction.

What the Plaintiffs have done amounts, as a matter of law and fact, to an abandonment of their ancient lights. Of the old light area, only a small portion is coincident with the new light area. The character of the Plaintiffs' building has been totally changed. Having themselves blocked out many of their old lights, though they have opened new ones, and having made their building of a uniform height, they could not have intended to rely on their old lights.

Tapling v. *Jones* (2) merely decided that the opening out of new lights did not take away the right to old lights. *Renshaw* v. *Bean* (3) was rectified to this extent, but only to this extent. The doctrine as to abandonment still remains, and was supported in *Stokoe* v. *Singers* (4). *Hutchinson* v. *Copestake* (5) was not overruled by *Tapling* v. *Jones*.

(1) 11 H. L. C. 290.

(2) Ibid. 290, 319.

(3) 18 Q. B. 112.

(4) 8 E. & B. 31.

(5) 9 C. B. (N.S.) 863.

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Fowlers v. *Walker* (1) shews not only that there must be sufficient evidence of what the alleged ancient lights were, but also evidence that the Plaintiffs have sustained substantial damage. That is to say, the Court has refused to act on the circumstance that a fragmentary portion of the new light was old, when it cannot be proved that the new erection will seriously interfere with that portion of the Plaintiffs' light which is privileged: *Clarke* v. *Clark* (2).

BACON, V.C. :—

The question before me is simply one of law, there is no difference between the witnesses as to the facts.

The owners of a building having certain windows, looking into a narrow street, pull them down and erect a very much larger building; but they take care to preserve the evidence of that which was perhaps of more value to them than the building which they pulled down, namely, the access of light, and they preserve and adduce, this day, evidence of the fact that upon the eastern wall looking into *Little Winchester Street* they had certain windows the enjoyment of which they retain, and will continue to retain, unless the Defendants block them out, as long as they remain the owners of the property. When they cease to be the owners, then somebody else will be the owner of similar rights. Mr. *Gregg*, no doubt, says, that when he inspected the Plaintiffs' building, he looked it all over very carefully, measured it, corrected the measurements, added to the drawing the roof, and what was above the parapet; and no doubt he did his duty like an ingenious, clever, scientific man, but he does not say one word about any agreement between the parties about the lights. He says he "concluded," but it is impossible that he could have concluded anything in point of right reason. I do not mean to contradict his statement that he did conclude, but when a man is re-building an external wall in place of one which had windows in it, can anybody safely "conclude" that because he is going to deal with that wall he means to give up his right to the window lights? It is out of the question. If there had been any agreement at that time, Mr. *Gregg* would not have been slow to say so. If there had been any suggestion that new windows were to take the place of the old ones, that would have been stated; but nothing of the kind is said, and the evidence is all one way. The maps and plans before me have been used as freely by the Defendants as they were used by the Plaintiffs. They are referred to in the statements in the affidavits and in the arguments of counsel; and there is no dispute that the Plaintiffs were entitled to many windows in their old house, although in the erection of their new house they acquired a much greater degree of light. But how does that lead to the conclusion that they meant to part with what they had? Could the Defendants at any time have supposed that if no new building of the Plaintiffs had been erected, and the old building had remained, they could then do what they propose to do? They could not. Enjoyment for more than twenty years of the old windows is proved, and not disputed. Can the Defendants build up a wall which will exclude the light in the old windows? On the facts before me with which I have to deal here, I come to the clear conclusion that the Plaintiffs are entitled, by means of an injunction, to be quieted in the possession they have had for so many years. The injunction goes no farther. I am told that there may be other questions raised. If they are raised they will be discussed. If the good sense of the parties had prevailed instead of wasting their time, and something besides, in discussing the question of the injunction, they should have agreed to make this motion the hearing of the cause, and at once had a judicial decision on the point which is said to remain for disposition when the case is heard.

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(1) 49 L. J. (Ch.) 598; S. C. on app. 51 L. J. (Ch.) 443.

(2) Law Rep. 1 Ch. 16.

Then as to the abandonment, as it is called, I have dealt with the first part of the case; and I am happy to say since the case of *Tapling* v. *Jones* (1), that which was a disgrace to English law has been abolished, and now good sense prevails, and a man who is entitled to a certain light does not lose his right to enjoy it, because he makes the opening bigger. The notion of the Plaintiffs' giving up any right rests solely on Mr. *Gregg's* statement. Mr. *Gregg* says he "concluded" without mentioning any one fact

(1) 11 H. L. C. 290.

on which I can say he concluded rightly, or that that was the whole transaction. I am bound, therefore, to grant the injunction. I am told, if I were to balance the injury which will be done to the Defendants by an injunction, it will be greater than that suffered by the Plaintiffs, if no injunction is granted. I do not think so. I think if I were to refuse the injunction, and the Defendants were to go on and build, and if at the hearing it was found they had gone on in their own wrong, it would be a much greater injury to them to have to pull down their new house, than it is now to be asked to stay their hands (for that is all the injunction does) until the question of law—for there is no question of fact—can be decided between the parties.

I grant the injunction.

J. B. D.

C. A.

From this order the Defendants appealed. The appeal came on for hearing on the 30th of April, 1884.

Sir *F. Herschell*, S.G., *Marten*, Q.C., and *Joseph Beaumont*, for the Appellants:—

We contend, in the first place, that the Plaintiffs have no right at all, for their windows have been altered in a way which amounts to an abandonment of the ancient lights. Their building is a new building, and only small parts of their present windows occupy parts of the openings of the old windows. *Hutchinson* v. *Copestake* (1) decides that this destroys the old right, and that case has never been overruled. The decision of it did not turn at all on the doctrine of *Renshaw* v. *Bean* (2), which the majority of the Judges who decided *Hutchinson* v. *Copestake* in the Exchequer Chamber were prepared to overrule, and they decided the case on another ground. That *Hutchinson* v. *Copestake* was not decided by the Exchequer Chamber on the ground of *Renshaw* v. *Bean* is clearly shewn by *Blackburn*, J., in *Tapling* v. *Jones* (3). The doctrine of *Renshaw* v. *Bean* was that if *A.* having ancient lights over *B.*'s land opened new ones and *B.* could not darken the new ones without an erection which would also darken the old ones, he was at liberty to darken them, and

(1) 8 C. B. (N.S.) 102; 9 C. B. (N.S.) 863.

(2) 18 Q. B. 112.

(3) 12 C. B. (N.S.) 826, 836.

the effect of the decision of the House of Lords in *Tapling* v. *Jones* (1) is simply to overrule that doctrine. Lord *Westbury* indeed (2) couples *Renshaw* v. *Bean* (3) and *Hutchinson* v. *Copestake* (4) together; but he was in error in doing so: the two cases are perfectly distinct. Some of the Judges in *Hutchinson* v. *Copestake* approved of *Renshaw* v. *Bean*, the majority did not; but all agreed in deciding it upon the ground on which it was decided. That case stands, and is applicable to the present (5).

[Baggallay, L.J., referred to *Staight* v. *Burn* (6).

Lindley, L.J.:—Do you say that if every old window is enlarged the right is lost?]

No; for in that case the access of light to all the old space

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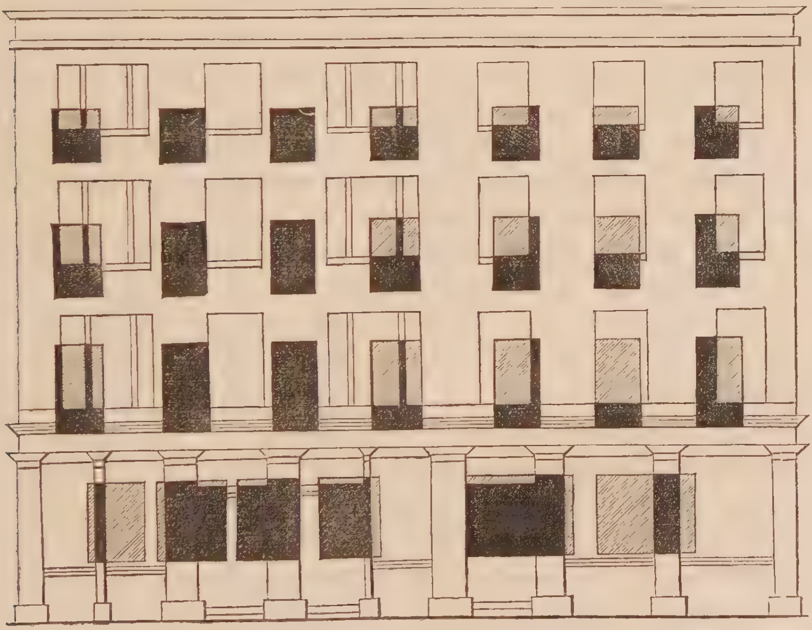
(1) 11 H. L. C. 290.

(2) Ibid. 306.

(3) 18 Q. B. 112.

(4) 8 C. B. (N.S.) 102; 9 C. B. (N.S.) 863.

(5) The annexed plan shews the alterations of the plaintiff's windows in *Hutchinson* v. *Copestake*. The parts of the old windows which were included in the new windows are shaded; and the parts which were blocked up by the alterations are black. The whole of the new ground-floor wall above the window sills was glazed, except the spaces occupied by the pilasters and doorways.



(6) Law Rep. 5 Ch. 163.

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remains. *Staight* v. *Burn* (1) is not against us; it merely gave the person who had altered his windows a *locus pœnitentiæ*, and allowed him to restore them to the old form. *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (2) adopts our view, and lays down that the new windows must be substantially the same as the old to retain the right. The observations of Lord Justice *James* in *Fowlers* v. *Walker* (3) tend the same way, and also *Ecclesiastical Commissioners for England* v. *Kino* (4). There is here professional evidence that the windows have been altered in a way quite inconsistent with an intention to retain the lights, whatever coincidence there is of new windows with old is purely accidental. The permanent alteration of the windows proves abandonment: *Stokoe* v. *Singers* (5).

We say, then, that the Plaintiffs here have no ancient lights; but we also say that as regards a part of their frontage our erection makes no appreciable difference in the light, and as regards the rest there is only one window in that part which includes an ancient light, and the evidence shews that the loss of light in the room in which that window is will be very trifling. If, therefore, the Plaintiffs have a case, it is one for damages, not for an injunction: *Dent* v. *Auction Mart Company* (6); *Aynsley* v. *Glover* (7); *Holland* v. *Worley* (8). That case shews that the Court has a wide discretion as to whether it will grant an injunction or give damages. *Gaunt* v. *Fynney* (9) is an instance of giving damages instead of an injunction in a case of nuisance. In our case the old lights that are left open are so few that no appreciable difference in the light would be occasioned by blocking them up completely. *À fortiori* the effect of our building must be inappreciable.

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(1) Law Rep. 5 Ch. 163.

(2) 6 Ch. D. 757.

(3) 51 L. J. (Ch.) 443.

(4) 14 Ch. D. 213.

(5) 8 E. & B. 31.

(6) Law Rep. 2 Eq. 238.

(7) Law Rep. 18 Eq. 544; Law Rep. 10 Ch. 283.

(8) 26 Ch. D. 578. This case was at first cited by Counsel from the *Weekly Notes.*

COTTON, L.J., said that it was determined while the Lord Chancellor was sitting in the Court of Appeal that cases could not be cited from the *Weekly Notes.* No doubt they were generally accurate, but they were too concise to be safely read as authorities. They were only useful for the purpose for which they were intended, to inform the Court and the profession that certain points had been decided.

BAGGALLAY, L.J., expressed the same opinion.

(9) Law Rep. 8 Ch. 8.

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Hemming, Q.C., and *Byrne* (*C. J. H. Corbett* with them), for the Plaintiffs:—

If we have one light which was an ancient light we are entitled to protection for it. The right continues till intentional abandonment. Here the Appellants cannot shew that we have ever abandoned our rights. Opening a new window or enlarging an old one is no evidence of abandonment of the old right, nor does it impose any additional burden on the servient tenement. The Appellants rely on *Hutchinson* v. *Copestake* (1), but that case, as well as *Renshaw* v. *Bean* (2), is really overruled by *Tapling* v. *Jones* (3). If *Hutchinson* v. *Copestake* can be supported, it is on the ground that the Court held that there was evidence of abandonment; there is none here.

With respect to the question whether the Plaintiffs are entitled to damages or an injunction, that will be decided at the hearing. On this motion the Court must consider the question of balance of convenience. The inconvenience to the Defendants of an interlocutory injunction will be very slight; if they should be ultimately successful, it will only be a brief delay, while if ultimately unsuccessful they will be the serious sufferers by being allowed now to complete their building, as they will have either to pull down or pay very heavy damages, or both; and they can easily erect a screen to test the effect upon our light if they want evidence on that point. Whereas to the Plaintiffs the injury will be very great if the Defendants are allowed to proceed with their building, for it will destroy the marketability and the reputation of a large number of chambers now letting at many thousands a year; and whatever undertaking as to damages they may give will not compensate us. It is now becoming very usual for builders who are accused of interfering with ancient lights to hurry up the building, because they know that even if the action is decided against them the Court will be reluctant to

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(1) 9 C. B. (N.S.) 863.

(2) 18 Q. B. 112.

(3) 11 H. L. C. 290.

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make them pull it down again, and a jury would be still more unwilling to do so.

Beaumont, in reply:—

The injunction will be a serious loss to us. The Court is not in the habit of granting an interlocutory injunction where there is a serious doubt as to the plaintiff's legal right.

BAGGALLAY, L.J.:—

In this case the Plaintiffs and the Defendants are owners, for unexpired terms of different lengths, of properties on the opposite sides of a narrow street, about twelve feet wide, in the city of *London*, known as *Little Winchester Street*. The street runs in a direction north and south, and the Plaintiffs' property is upon the western side and the Defendants' property on the eastern side of this narrow street. At the present time the Plaintiffs' property consists of a very fine range of buildings approaching 200 feet in length, of fifty feet or thereabouts in height, with good architectural proportions, and uniform throughout as far as the *façade* is concerned. The Defendants' property is upon the other side of the street, opposite the Plaintiffs' premises, facing about 120 feet of them. At the southern end of the street, and for about twenty-four feet from the southern end of the Defendants' property, as it existed before it was recently pulled down, it was about the same height from the ground as the Plaintiffs', and for a space of about forty feet of the Defendants' property, only stood at a height of something like twenty feet. The Defendants are about to rebuild their property according to the proposed plans to a uniform height quite as high as, or higher than, the existing buildings of the Plaintiffs; and the Plaintiffs have commenced this action for the purpose of obtaining an injunction to restrain the erection of the buildings so as to interfere with what they have alleged to be the ancient lights of the Plaintiffs. The Plaintiffs' buildings as they at present exist were constructed in the year 1867, and prior to their reconstruction there were certain windows in the building which were acknowledged to be windows in respect of which they were entitled to protection as ancient lights. Upon the reconstruction of the building, when put into its existing form, the position of the windows in the building was very materially altered, but at the same time to a certain extent the existing windows comprise portions of what I may call the area of the old windows. In one or two instances it would appear that the new windows to a great extent correspond with the ancient windows, but in other cases the area of the ancient windows was more or less blocked up, but nevertheless in several windows the area of the ancient windows forms part of the present windows, and it is in respect of the portions of the said windows (using a term not strictly correct, but sufficient to express my meaning), which are comprised in the area of the new windows that the Plaintiffs claim their right to protection. If this case ever comes to be heard upon a trial of the action, it appears to me that there will be properly three questions to be determined by the Court. The first will be whether the alterations which were made by the Plaintiffs in 1867 amounted to an abandonment of their right to the ancient lights of which they were then possessed, or whether they continued after that period of time to retain those rights to any appreciable extent. Of course if the latter question is answered in the negative upon the hearing of the cause, the Plaintiffs' case is gone, but assuming that this question is answered in the affirmative, then the next question will be whether, if the building which the Defendants purpose to erect, is erected in accordance with its present scheme and design, there will be a substantial interference with the access of light through their windows; and the third question will be, assuming that the Court should arrive at that conclusion, that is to say, that there was no abandonment of the ancient lights, and that what is proposed to be done by the Defendants will interfere with the access to ancient lights to which the Plaintiffs are still entitled, then whether the injury which will be occasioned to the Plaintiffs should be compensated by damages, or whether there should be a perpetual injunction restraining the Defendants from interfering with the Plaintiffs. Those will be the three questions to be determined at the hearing if nothing be done in the meantime. But now we have to deal with the question of an application for an interim injunction. When the action was commenced and an application made to Vice-

Chancellor *Bacon* for an interim injunction, the Vice-Chancellor thought it right to grant that injunction, and this appeal has been brought and has been supported and opposed by able arguments.

The argument in support of the appeal amounts substantially to this. In the first place, it was said that the case is so clear that there was an abandonment of the right to ancient lights in 1867, that the Plaintiffs have no right whatever to come into this Court at all, and therefore the injunction ought to be discharged and nothing else done. The practical result of that view would be that at the hearing of the action the Plaintiffs' claim must be dismissed. Then it was argued in the second place, that if there was no abandonment of right, and if the right to light still remained, it would not be interfered with by the Defendants' building to any substantial extent, and certainly not to such an extent as would authorize the interposition of the Court to prevent the continuance of such interference. Then the third argument is that upon the hearing of the cause the only remedy to which the Plaintiffs would be properly held entitled to even if they succeeded upon the other points, would be a right to damages and not a perpetual injunction restraining the erection of the building. Upon that view of the case, of course, as regarded the first two portions of the argument, if well founded, we ought simply to discharge the order which was made by the Vice-Chancellor; but supposing we should be adverse to taking that view, then there would remain the question whether we ought to accede to the suggestion of the Defendants that instead of granting the interim injunction we should discharge the order of the Vice-Chancellor, allowing the Defendants to go on with their buildings, upon an undertaking by them to take them down again to such an extent, if any, as the Court should direct at the hearing of the cause, and that they would be answerable for any damage caused to the Plaintiffs by reason of the works going on until such time as they should be removed.

Now, I do not think it necessary to state in anything like detail my views upon the several points to which I have adverted, as the matter will be for the consideration of the Court upon the hearing; but if I were satisfied upon the evidence now before us that there had been in 1867 an abandonment of the right of the Plaintiffs to the lights, which down to that period they had possessed, I should have felt it my duty to act upon the opinion so formed; but I cannot say I have arrived at that conclusion. Certainly, the balance of my mind at present, although there may be additional materials brought before the Court at the hearing of the action, is, that there was not an abandonment, and I am very much influenced in arriving at that conclusion by the great care that seems to have been taken at the time of erecting the new buildings to make a record of the exact position occupied by all the ancient lights before the alteration was made, and to shew to what extent they would be interfered with or modified by the new windows; and evidently, to some extent, the efforts which were then made to secure a correct record of what the ancient lights were were communicated to the other side, though not to an extent from which it could be inferred that there was a recognition of the right of the Plaintiffs to retain such lights as they previously possessed. However, as I said before, there may be additional materials before the Court when the cause comes on for final hearing, which may induce the Court to come to the conclusion that there was an abandonment of the right. Upon this point I will make an observation upon the cases of *Renshaw* v. *Bean* (1) and *Hutchinson* v. *Copestake* (2), which have been adverted to in the course of the argument, and without going so far as to say that the decision in *Hutchinson* v. *Copestake* was at variance with the decision in the House of Lords in *Tapling* v. *Jones* (3), I am bound to say that if the true construction of *Hutchinson* v. *Copestake* is such as the Solicitor-General contended for here (which I do not think it is), namely, that in no case unless you preserve the old windows unaltered, can there be any right retained to the access of light, then such a decision has been interfered with and overruled by *Tapling* v. *Jones*. In *Hutchinson* v. *Copestake* in the Exchequer Chamber, Mr. Justice *Crompton* and Mr. Justice *Hill* had previously given their judgments, entirely basing them upon the decision in *Renshaw* v. *Bean*, but Mr. Justice *Blackburn*, speaking for himself and Mr. Baron *Channell*, said (4): "We consider this a very different question, on which, if it was raised by the facts, we should be bound to deliver an opinion. As it is, without doing so, we rest our concurrence in affirming the judgment on the ground, that, comparing the tracings, which are part of the case (1), we find that no one of the plaintiff's present windows substantially corresponds with an ancient window; and we draw the inference of fact that no one of the present lights claimed is a continuation of one of the ancient lights. We perfectly concur in the reasoning of my Brother *Crompton*, by which he shews that the new and the old window may occupy in part the same space, without the right to light claimed through the new window being the same right as that enjoyed for twenty years without interruption through the old one." That being the view of Mr. Justice *Blackburn* and Mr. Baron *Channell*, Mr. Baron *Bramwell* added these words: "I concur in this judgment, solely on the ground that no one of the existing windows occupies the same position as any one of the ancient windows did, and consequently that by no one of them have the light and air been enjoyed for twenty years, and so no right has been acquired in respect of any of them against the Plaintiffs." In the course of the argument the Solicitor-General drew our attention to the sketch of the old and new windows as they existed in that case of *Hutchinson* v. *Copestake* (2), and certainly it would be quite accurate, as Mr. Baron *Bramwell* put it, to say that no one of the existing windows exactly coincided with one of the ancient windows. There were some very closely approximating, but some of those most closely approximating to the ancient windows were slightly added to in the new windows, and that to some extent, no doubt, supported the argument of the Solicitor-General as regards the true effect of the decision in *Tapling* v. *Jones* (3).

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(1) 18 Q. B. 112.

(2) 9 C. B. (N.S.) 863.

(3) 11 H. L. C. 290.

(4) 9 C. B. (N.S.) at pp. 870, 871.

Well, then, the next question that would appear to come under the consideration of the Court upon the hearing of this action, would be whether, assuming there has been no abandonment of the right in regard to such portions of the ancient windows as now form a portion of the area of the new windows, there will be by the construction of the proposed building of the Defendants, a substan-

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(1) See a copy of the sketch, *ante*, p. 49.

(2) 9 C. B. (N.S) 863.

(3) 11 H. L. C. 290.

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tial interference with the access of light, and in point of fact, a deprivation of that light which unless such addition were made to the buildings the Plaintiffs would otherwise enjoy. No doubt we have had evidence given by a gentleman of very considerable experience, as regards experiments he has made, and from which he has come to the conclusion that there will not be a substantial deprivation of light, but, as I observed before, in cases of this kind you really hardly want the assistance of expert evidence to tell you what will be the effect of raising a wall immediately opposite a window. The upper portions of the windows of the ground floor are very nearly ten feet above the level of the floor, and at present there is an existing wall twenty feet high opposite, and if you raise that wall and make it fifty feet instead of twenty feet it appears to me very difficult to say that these windows upon the ground floor will not be interfered with to a substantial extent by the raising of the opposite wall. That will apply so far as there is any right to ancient lights in respect of the windows upon the ground floor to a greater extent, because as the building at present exists there will be a horizontal access of light which will be interfered with by the raising of the wall; nor am I at present certain what will be the effect upon the lateral access of light, because there are windows both upon the right hand and upon the left, and it would appear that at the later part of the day a considerable amount of light must come to these windows. But however that is a question to be discussed more fully at the hearing of the cause. At any rate, it appears to me that there is a question to be tried as far as regards the alleged abandonment of the ancient lights and a question to be tried as far as regards the substantial interference with the ancient lights, if they do exist, to the present day.

Then comes the question whether now, at the present time, the Plaintiffs shall be protected by a continuance of the injunction which the Vice-Chancellor granted, or whether the real justice of the case would not be sufficiently met by ordering the injunction to be discharged, and allowing the Defendants to go on with their building upon giving an undertaking to pull it down again if the Court should direct that it should be pulled down again to such an extent as the Court should think fit. At one time I must say I was disposed to think an undertaking of that kind on the part of the Defendants would sufficiently meet the merits of this case, and more especially so when the Defendants offered to give in addition to that an undertaking not to raise any portion of their building higher than the existing buildings of the Plaintiffs. But upon a more mature consideration of the case, having had the advantage of the arguments which have been addressed to us upon the part of the Plaintiffs, I have arrived at a different view, and in my opinion I think the balance of convenience shews that the best course to pursue will be to allow the injunction to continue. If the Defendants should ultimately turn out to be right they will be damaged by the continuance of the injunction, but there is an undertaking on the part of the Plaintiffs to meet any damages which the Defendants may sustain to such an extent as the Court may direct, and it appears to me that it will be a less inconvenience to the Defendants than that they should be allowed to continue their building upon an undertaking to pull it down again, because there would be always a considerable doubt hanging over them which might materially interfere with the dealing with the property. And I do not altogether disregard the argument which has been addressed to us, that though probably if the present Court had thought it right to impose such an undertaking upon the Defendants it would have enforced that undertaking if the ultimate result of the decision should be against the Defendants; yet one cannot feel with confidence that upon the facts coming before the Court the result might not happen which has happened upon other occasions where the Court has felt the destruction of property very undesirable, and a view has been taken, which the plaintiff has been unable to resist, that he should accept compensation in the form of damages instead of the pulling down of the premises. Nor do I forget the last argument addressed to us by Mr. *Byrne*, that it is really the Defendants who have brought the matter about, and have done that which has given rise to the litigation; therefore, bearing all these circumstances in mind, I think that the order of Vice-Chancellor *Bacon* was right, and that the appeal should be dismissed, and I see no reason why being dismissed it should not be dismissed with costs.

COTTON, L.J. :—

In this case the Vice-Chancellor has granted an injunction to restrain the Defendants, whose building was opposite the building of the Plaintiffs, from raising their building so as to obstruct or interfere with the lights of the Plaintiffs. The case has been fully argued, although only an interlocutory injunction was granted, and I must confess I regret that we are unable to do now that which might have been done with consent by the Court of Appeal in former days, namely, to turn the motion for an injunction into the hearing of the action and to decide it with, if necessary, such additional evidence as either party might have desired to bring. But that we cannot do, and therefore we can only deal with this which is an appeal against an interim injunction. What we have to consider is this, whether the materials that are before us shew a probability that at the hearing the Plaintiffs will get an injunction, and the balance of convenience or inconvenience of granting or refusing an injunction. One point, and a very material question, involving a matter of law, and one which must very much influence our decision upon the question whether an injunction should be granted, was in respect of what windows or rather in respect of what parts of windows the Plaintiffs are entitled to any protection, and whether they are entitled to protection in the way of injunction. That is the material question. Upon the one hand it was contended upon the part of the Defendants that the Plaintiffs had, when they rebuilt their premises, entirely abandoned all their ancient lights, and some communications that had taken place between the surveyors of the Plaintiffs and the surveyors of the owners of the Defendants' property were relied upon. Whether the Defendants have any fresh evidence and will be able to make out an intention on the part of the Plaintiffs to abandon their old lights is a question not to be determined now, and all I will say is that, upon the evidence before us, in my opinion, there is no probability that the Plaintiffs intentionally abandoned their right to the ancient lights, but as far as one can see upon the evidence they did their best, whether successfully or not, to construct the building so as to retain the protection which the use of the light through the old windows would give them. Of course it is an entirely different question whether by what the

Plaintiffs have done they have lost in respect of any or all of the windows the right to ancient light. I may state this generally; it is a building of four floors, and as regards the different floors there are portions of the area occupied by the new windows which comprise the area of the old lights, and in some cases in very insignificant dimensions. As regards the second and first floors, there are undoubtedly windows which do contain portions of the area occupied by ancient windows, and with respect to those upon the ground floor it is shewn that although none of the new windows are coincident in area with the ancient lights in the old building, yet there are windows which include the whole of the area occupied by windows in the old building, and some others which contain a more or less substantial portion of the area of the ancient windows in the old house. It was contended on behalf of the Defendants, as I understand the argument, that there was authority which shewed that in respect to all these windows which were not coincident with the windows in the old house, the Plaintiffs had lost their right, and *Hutchinson* v. *Copestake* (1) was the case relied upon; whereas, upon the other hand, the Plaintiffs contended that *Tapling* v. *Jones* (2), in the House of Lords, overruled altogether what was laid down in *Hutchinson* v. *Copestake*, and that according to the decision of the House of Lords in *Tapling* v. *Jones* the Plaintiffs remained entitled to their legal right, and to the protection of an injunction in respect of all those portions of their present windows which were coincident with any portion of the old lights in the old house and corresponded with any portion of the old lights. In my opinion *Tapling* v. *Jones* did not decide that. That case is reported both in the House of Lords and in the Court of Exchequer Chamber; and it was remarked by the Judges that there the plaintiff had one window in his new building which was entirely coincident with—except that it had been reconstructed—the ancient light in the ancient building, and in my opinion all that *Tapling* v. *Jones* decided was this, that where there is a modern light in a reconstructed building coincident with an old light there, the right to be protected was not lost by putting other lights in the building which were not entitled to any protection from being ancient lights—that is to say, a neighbour could not under the guise of these new lights having been added claim to obstruct the windows in respect to which the right to an ancient light could be claimed. But that was not overruling the principle to be found in *Hutchinson* v. *Copestake* (1), as laid down by Lord *Blackburn* and Lord *Bramwell.* In that case, what they decided was—the passages have been read by Lord Justice *Baggallay* and I will not repeat them—that there was no window in the new building which was coincident with the old windows, and therefore there was no light in the new building which could be considered as a continuation of any ancient light. *Tapling* v. *Jones* (2) decided that by constructing new windows, either by the side of or above or below the ancient light in a reconstructed building, the right in respect of it was not lost, and I can see no reason why, when a window is reconstructed, which has within its area the entire area of an old ancient light entitled to protection, if the building is reconstructed, with that in its exactly former position, the addition to the area of a new window which included the area of the old would destroy the right which would have existed if instead of being within the same mullions it had been an addition of a window just by the side of the old window. I understand the ruling to be that although there is a portion of the ancient light coincident with a portion of the new light, yet if the new light does not include the area of the old light or if there is not substantially the area of the ancient light included in the new, it cannot be said to be a continuance of the ancient light, and a plaintiff cannot seek protection in respect of the existing windows simply because he has got a little bit of the area of the ancient light included in the area of the new, which is not a continuance of the ancient light. There would be a question as to whether the Plaintiffs here have at law a right in respect of a great many of these windows, but undoubtedly there are some of their windows which do include the entire area of the old lights, and in my opinion, having regard to *Tapling* v. *Jones*, they are entitled in respect of the area of the old ancient lights included, substantially, in the area of the new lights, to protection.

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(1) 9 C. B. (N.S.) 863.

(2) 12 C. B. (N.S.) 826; 11 H. L. C. 290.

I do not think it necessary, as regards this case, to decide

(1) 9 C. B. (N.S.) 863.

(2) 11 H. L. C. 290.

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whether or no the right at law may or may not exist in respect of a good many of these windows. The Plaintiffs have contended that they are entitled to legal protection and protection in equity in respect of all these windows, which include any portion of the area of the ancient windows and at any rate to protection as regards the portions of their windows which do include or coincide with any portion of the area of his ancient windows. But it is a very difficult question, to my mind, whether, although they may have their legal right of action in respect of windows which include in their area any substantial portion of their ancient lights, they are entitled to an injunction; because an injunction is only granted where there is a substantial interference with the access of light; and where the portion of the ancient window area which is retained in the area of the new windows is comparatively small, it may well be, and in my opinion would be the case, that even if the Plaintiffs were entitled to maintain an action at law, the damage to them by blocking up the only portion of the new window in regard to which they would be entitled to protection at all, must be so immaterial as not to entitle them to the protection of a Court of Equity by injunction in respect of that portion of the window, even although it may be legally considered as an ancient light. That was apparently the view taken by Lord Justice *Giffard* in *Staight* v. *Burn* (1), when referring to the case of *Heath* v. *Bucknall* (2), he says: "I cannot take it as having been decided otherwise than upon its particular circumstances; those particular circumstances, as I gather them, being, that a very small and almost inappreciable proportion of the ancient window was preserved, and the rest was new; so that there would have been no material damages at law." Therefore, in my opinion, we must disregard those windows in the first and second floors, when one comes to consider what probability there is of the Plaintiffs establishing at the hearing a right to an injunction. But there are certainly some which do contain the entire or substantial area of the old lights, and as the Plaintiffs press that there should be a continuation of the injunction, I think we ought not to disturb the order. That is my view, not because I doubt the efficacy of undertakings to pull down; for

(1) Law Rep. 5 Ch. 163, 166. (2) Law Rep. 8 Eq. 1.

in my opinion it ought to be at least as advantageous to the Plaintiffs to have such an undertaking as for the Defendants to give it; and I repeat again what I have said before in other cases, that where the defendant says that his building when completed will do no damage, and if he is not restrained he will undertake to pull it down, if it is found at the hearing that it will, I think it would be wrong if the Court were to take such an undertaking, and then when it comes to a hearing not to enforce it, just as much as it would grant an injunction if the building had not been put up. I therefore do not decide in favour of granting a continuance of the injunction upon the ground that the Judge upon the hearing would decline to enforce the undertaking offered by the Defendants in order to avoid an interlocutory injunction, but because upon the whole I think it is better here to continue the injunction. Of course if it turns out that the Defendants are right, loss may be occasioned to them, and as to that the Plaintiffs have given an undertaking for which they will be answerable. It certainly would be more difficult to ascertain what was the injury to the Plaintiffs, if during the continuance of this action the Defendants were allowed to go on with their building, and therefore having regard to the fact that the Plaintiffs will have to account to the Defendants if they are wrong for whatever damages they may have sustained, I think, as I have said, the proper thing is to grant a continuance of the injunction. Of course the Defendants may go on and put up their building to the height of their ancient building, so as not to interfere with the Plaintiffs' lights, and the Plaintiffs will be answerable in damages to the Defendants if they are wrong, and the amount can be ascertained without more difficulty than usually occurs in most questions of damages.

Then as we continue the injunction, of course the Defendants will be anxious that the case should be brought on as speedily as possible, and that is not without influence upon my mind in considering what ought to be done. The injunction being continued, I think the Plaintiffs ought to undertake to speed the action, that is to prosecute the action with due diligence, and if there be no delay on either side, probably the action will be decided and judgment obtained one way or the other without any very great delay.

LINDLEY, L.J.:—

I am of the same opinion as to the result. The case to my mind presents several questions of difficulty which will have to be encountered, but we cannot upon the present materials go the length of saying that the Plaintiffs have lost all their rights and are entitled to no relief—that would certainly be going too far upon such materials as we have got before us. I do not propose to discuss with any exactness or in any detail what their rights may be, I will merely mention that in respect to the cases of *Renshaw* v. *Bean* (1) and *Hutchinson* v. *Copestake* (2) it appears to me that the Courts ought to be careful not to reinstate and revive *Renshaw* v. *Bean* by inferring abandonment upon the method of reasoning which was condemned by the House of Lords in *Tapling* v. *Jones* (3). *Renshaw* v. *Bean* was not decided upon the ground that the rights were abandoned but upon another ground, and it would be only to revive that which the House of Lords condemned to shift the ground, and say that a plaintiff conducting himself as in *Renshaw* v. *Bean* had lost his rights by abandonment instead of by the more circuitous process as pointed out by the Court of Queen's Bench. With regard to the greater part of these windows, I must say I do not see very strong evidence of abandonment—there is evidence from which I should think no Court or Judge would say that the great bulk of the lights had been abandoned, but as to some there is very considerable evidence the other way. I do not at all take the view that the preservation of the lower lights was accidental, I take it that it was intentional and done on purpose to preserve if possible the right to the old lights, and by preserving the right to the old lights to in fact gain a right of access of light to all the new ones. That is what the Plaintiffs were intent upon doing, but whether they succeeded in doing it is another matter. As regards the old lights there will be and must be a considerable diminution of light if the Defendants' building is carried up as intended—that is tolerably obvious, but whether that will enable the Plaintiffs to maintain or obtain an injunction, or whether on the other hand, at the hearing the proper method of dealing with the case will not be to refuse to grant the injunction and let the

(1) 18 Q. B. 112.
(2) 9 C. B. (N.S.) 863.
(3) 11 H. L. C. 290.

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Defendants complete their building without prejudice to the Plaintiffs' right to damages, or to have compensation, is another matter. We do not decide that now. What we have to decide is what ought to be done under the circumstances as they exist. The circumstances as they exist are these: the Defendants have pulled down their old building but not begun to erect their new building, and they will if they choose, notwithstanding the injunction, still be at liberty to do a great deal, they can go on building up to the extent to which they had the building before without any risk, and if they go higher of course they do so at their peril—if they go higher they must take precautions not to interfere with the ancient lights, but at all events the injunction will not prevent them from restoring their building in the new form in accordance with the old height if that suits their convenience. Upon the whole it seems to me to be best that we should give them liberty to do no more than that. One can see plainly enough that if the building is completed before the trial, and if the question of abandonment should then go before a jury, the jury would be very apt—I do not say they ought—to infer an abandonment in order to avoid the consequences of pulling down handsome buildings such as the Defendants propose to build. I do not think that that risk ought to be run. The Defendants have the option to build up to the original height of their old building or leave it alone, and considering the really serious questions that arise and the extreme difficulty of doing justice if the buildings are put up, it appears to me upon the whole that the best thing to do is to maintain the injunction.

COTTON, L.J.:—

I should have added that I thought upon the evidence that there was at least a probability that the Plaintiffs would shew substantial injury to those lights, in regard to which they were entitled to protection, but I do not think it necessary to go into that.

Solicitors for Plaintiffs: *E. W. & R. Oliver.*
Solicitors for Defendants: *Bircham & Co.*

M. W.

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May 23.

TREHERNE *v.* DALE.

[1883 T. 2169.]

Attachment—Rules of Supreme Court, 1883, *Order* XLI., *r.* 5*—Indorsement on Order—Form of Notice of Motion for Attachment—Order* LII., *r.* 4.

By order of the 28th of February, 1884, the Defendant was directed to pay a sum into Court by the 13th of March. This order not having been served before the 13th of March, an order was made on the 3rd of April enlarging the time until four days after service of the two orders. The Plaintiff served the two orders, indorsing on the former the notice given in Order I. of the 7th of January, 1870, but putting no indorsement on the latter. The money not having been paid in, the Plaintiff moved for an attachment "for your default in obeying the orders made herein on the 28th of February last and the 3rd of April last," supporting it by an affidavit that the Defendant had not borrowed the order for the purpose of paying in the money, nor given notice of having paid in the money:—

Held, that as the second order did not require the Defendant to do any act, but only extended the time for doing the act mentioned in the first order, it was sufficient to indorse the first order only:

Held, also, that the indorsement was sufficient in form, for that although not in the words of the indorsement given in the rules of 1883, Order XLI., rule 5, it was to the same effect:

Held, also, that having regard to the nature of the orders, a notice of motion to attach "for default in obeying" them sufficiently stated the grounds of the application within the meaning of Order LII., rule 4:

Held, also, that though the affidavit in support of the application would probably have been held insufficient to support an attachment, if the motion had been heard on affidavit of service, the defect was cured by the Defendant's appearing and resisting the application on other grounds.

ON the 28th of February, 1884, an order was made that the Defendant *Dale* should pay into Court, on or before the 13th of March, 1884, to the credit of the action, £474 3*s.* received by him as executor of the will of *William Gooch.*

On the 3rd of April, 1884, the Plaintiff moved for an attachment. The order had not been served till after the 13th of March, and the Court was of opinion that an attachment therefore could not be ordered, but made an order "that the time for making the payment into Court directed by the said order be enlarged until four days after service thereof and of this order."

On the 9th of May the Plaintiff served the Defendant with the

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two orders. The earlier order was indorsed, "If you the within-named *Augustus Dale* neglect to obey this order by the time therein limited, you will be liable to have your property sequestered for the purpose of compelling you to obey the same order, and you may also be liable to be arrested and committed to prison" (1). The order of the 3rd of April was served without any indorsement.

The money not having been paid into Court, the Plaintiff, on the 18th of May, served the Defendant with notice that an attachment might issue against him "for your default in obeying the orders made herein on the 28th day of February last and the 3rd day of April last." The application was supported by an affidavit of the Plaintiff's solicitor of service of the orders, which proceeded to say, "the Defendant has not since then applied for the loan of the order to pay in herein for the purpose of paying in the amount ordered to be paid in, nor has he given notice of having paid in the amount ordered."

The motion was made on the 22nd of May. The Defendant appeared by counsel, and did not allege that he had paid in the money, but raised the technical objections which were afterwards renewed before the Court of Appeal, and also made the case that he had drawn out the money for the purpose of paying it to the Plaintiff, and carried it in a black bag, that this black bag had been taken away when the Defendant was at lunch, by a person who lunched at the same place and left a similar bag in its room, and that the missing money could not be recovered. The Defendant urged that as the money had not been misapplied, and the Defendant was a poor man and had no means wherewith at once to replace it, the Court, although the money was lost in such a way that the Defendant was still liable for it, would not order an attachment. Mr. Justice *Kay* disbelieved this story, and ordered an attachment to issue. The Defendant appealed, and the appeal by special leave was heard on the following day.

Oswald, for the appeal:—

The Plaintiff did not indorse his orders properly; he only indorsed the order of the 28th of February, which could not be complied with; and put no indorsement on the order which defined the time within which the payment was to be made. The service, therefore, was irregular, as the indorsement ought to have been on both the orders.

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(1) Gen. Order, 7 Jan. 1870, r. 1.

BAGGALLAY, L.J.:—I do not think that Order XLI., rule 5, of the rules of 1883, applies to the second order, which does not require the Defendant to do any act, but only extends the time for doing it which was limited by the former order. The objection fails.

COTTON, L.J.:—I am of the same opinion.

LINDLEY, L.J., concurred.

Oswald, for the Appellant:—

The indorsement is irregular on another ground. It is not in the form prescribed by Order XLI., rule 5, but is in the old form which was in use in the Court of Chancery before the *Judicature Acts*. Then again Order LII., rule 4, requires that every notice of motion for attachment shall state the grounds of the application. Here the notice of motion alleges only disobedience to two orders, the dates of which are given, but not their effect. This is insufficient, for it would not give an illiterate defendant information what he was required to do. Lastly, there was no sufficient evidence that the money had not been paid into Court. There was only an affidavit that the Plaintiff's solicitor had had no notice of its having been paid in, and he did not state that he had inquired at the Paymaster-General's office.

Then as to the merits, if the Defendant's story is believed he lost the money under circumstances which do not excuse him from liability to make it good, but the Court now having a discretion under 41 & 42 Vict. c. 54, s. 1, whether it will order an attachment or not, will not issue it unless there has been a wilful misapplication of the money: *Holroyde* v. *Garnett* (1); *Marris* v. *Ingram* (2). The evidence of the Defendant as to the loss ought to be believed.

(1) 20 Ch. D. 532.

(2) 13 Ch. D. 338.

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Allen, contrà, proceeded to point out some inconsistencies in the Defendant's story, as shewing that credit ought not to be given to it. [He was then stopped by the Court.]

Oswald, in reply.

BAGGALLAY, L.J.:—

The Defendant's first technical objection that the orders of the 28th of February and the 3rd of April were not both indorsed before service has been disposed of. His second objection was, that the indorsement was not in a proper form, not being in the words given by Order XLI., rule 5, but in the old Chancery form. The rule, however, does not provide that the indorsement must be in the words there mentioned, but "in the words or to the effect following," and in my opinion this indorsement is to the effect mentioned in the rule. The third was, that the notice of motion did not sufficiently state the grounds on which an attachment was sought. I think that, having regard to the nature of the orders, the combined effect of which was to order payment into Court of a specified sum within a specified time, the ground was sufficiently stated. The fourth objection, that there was no sufficient evidence of non-payment, is disposed of by the fact that the Defendant appeared and did not dispute the fact of non-payment.

[His Lordship then entered into a consideration of the story told by the Defendant as to the loss of the money, and concluded:—]

If this story were satisfactorily shewn to be true, I should say that, the Defendant being a poor man, an attachment ought not to issue. But Mr. Justice *Kay* came to the conclusion that it was not to be believed, and I see no sufficient reason for saying that his Lordship came to a wrong conclusion. The appeal must be dismissed.

COTTON, L.J.:—

The Defendant has taken several technical objections to the order, none of which, in my opinion, are sustainable. I will only

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say a word as to the last, viz., that there was no sufficient evidence of non-payment. If the order for an attachment had been made on affidavit of service, without any further evidence than was before the Court, the objection would probably have been fatal. But the Defendant appeared and did not dispute the fact of non-payment, but argued on other grounds that an attachment ought not to issue. This removes the objection.

As to the merits, the Court has a discretion as to ordering an attachment, and if it had been satisfactorily shewn that the money had been lost, an attachment ought not to have been issued, it being clear that, if it had been lost, the Defendant was not in a position immediately to replace it. The question then is, whether Mr. Justice *Kay* was wrong in disbelieving the Defendant's story of the loss. [His Lordship then gave his reasons for considering that Mr. Justice *Kay* was right in disbelieving it.]

LINDLEY, L.J.:—

I am not prepared to differ. Whether, if the case had come before me in the first instance, I should have ordered an attachment, I do not know. I am not at all satisfied that the Defendant's story is true, but whether I should have felt so satisfied of its being untrue as to send the Defendant to prison, I am not sure. I cannot, however, go so far as to say that Mr. Justice *Kay* was wrong in holding it to be untrue, and I therefore cannot come to the conclusion that his decision ought to be reversed.

Solicitor for Plaintiff: *Edmund H. Greenhill.*
Solicitor for Defendant: *J. P. Ogle.*

H. C. J.

ROLLS *v.* MILLER.

[1883. R. 2413.]

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PEARSON, J.
March 7, 8.
C. A.
May 20, 28.

Covenant—Lease—Restriction against Trade or Business—Charitable Institution where no Payment received—"Home for Working Girls."

The lease of a house contained a covenant that the lessee should not use, exercise, or carry on upon the premises any trade or business of any description whatsoever:—

Held (affirming the decision of *Pearson*, J.), that a charitable institution called a "Home for Working Girls," where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of the covenant.

It is not essential that there should be payment in order to constitute a business; nor does payment necessarily make that a business which without payment would not be a business.

THIS was a motion to commit the Defendants, the trustees of a charitable institution known as the "Home for Working Girls," for a breach of the order made by Mr. Justice *Pearson* on the 23rd of November, 1883, restraining them from using the house No. 13, *The Paragon, New Kent Road*, or permitting the same to be used as one of the "Homes for Working Girls in *London*," and from otherwise using the said premises, or permitting them to be used, in breach of the covenant in that behalf contained in their lease (1).

The lease was dated the 30th of July, 1825, and thereby the Plaintiff demised the premises to *J. Russell* for a term of eighty years from Michaelmas, 1824. The lease contained the following covenant:—

"And further that the said *J. Russell*, his executors and administrators, shall not nor will at any time during the term hereby granted use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the premises hereby demised any trade or business of any description whatsoever without the consent of the said *J. Rolls*, or his assigns, or of the person or persons so entitled as aforesaid, in writing."

The lease afterwards became vested in the Defendant, Mr. *Miller*, who granted an underlease for twenty-one years to the other Defendants, the trustees, which contained a similar covenant, but with the proviso that nothing therein contained should be deemed to prohibit the use of the premises as a Home for Working Girls, or to render it requisite for the lessees to obtain any consent from the lessor or any other person or persons before using the same for that purpose.

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(1) 25 Ch. D. 206.

The girls received into the institution made small payments for the use of their rooms and for food daily provided for them according to arrangement, but it appeared from the yearly accounts of other similar homes that no profits were really made, but on the contrary there was always a heavy loss.

The Plaintiff having brought the present action to restrain the Defendants from using the house for the purpose of a Working Girls Home, on the ground that it was a violation of the covenant not to use it for any trade or business, Mr. Justice *Pearson* granted an injunction till the hearing as previously reported.

After this order was made the Defendants, the trustees, gave notice to the Plaintiff that they had decided to open the house as a home for the free use of working girls, without taking any payment, which they considered not to be a breach of the injunction: and, in answer to a letter from the Plaintiff's solicitor asking for a more clear declaration of their intention, they sent the following letter:—

"You are quite correct in assuming that our previous letter was intended to give you definite notice of the intentions of the Defendant trustees.

"The following regulations have been decided upon, though possibly they may hereafter be added to so far as the domestic arrangements are concerned, and they will we think give you sufficient information as to the manner in which it is proposed to use the house.

"1. This house is intended by the committee for the free use of working girls and young women between the ages of fifteen and twenty-five, who are without situations and temporarily unable to support themselves.

"2. All applications for admission to be made personally to the superintendent, with whom will rest the right of refusing admission without alleging any reason, and to whom satisfactory references as to respectability must be furnished.

"3. No charge of any kind will be made for the use of this house, or for any meals that may be supplied therein.

"4. The residents will therefore consider themselves as guests of the superintendent and committee, and will, it is hoped, feel it incumbent on them to regard the wishes of the superintendent, who so far as possible will desire them to conduct themselves as if they were in their own homes.

"5. The superintendent, however, wishes it to be understood that the residents will be expected to attend the morning and evening family prayers in the house, and also to attend Divine service every Sunday at some place of religious worship to be approved of by her, and to render her, if and when she wishes it, cheerful assistance in the performance of the domestic duties of the house."

The parties agreed that this declaration of intention to open the "Home" should be taken as an actual user of the house in the mode proposed, and the Plaintiff moved for a writ of attachment against the Defendants for breach of the injunction. The motion came on for hearing before Mr. Justice *Pearson* on the 7th of March, 1884.

Cozens-Hardy, Q.C., and *Butcher*, for the Plaintiff.

Sir *F. Herschell*, S.G., *W. W. Karslake*, Q.C., and *Birrell*, for the Defendants.

PEARSON, J.:—

The application in this case is supplemental to one that was made to me in November last year. On that occasion the Plaintiff applied for an injunction against the Defendants, who are trustees of a society which is engaged in work touching homes for working girls in *London*. The injunction was to restrain them from establishing one of their homes at No. 13, *The Paragon*, *New Kent Road*, on the ground that in the original lease there was a covenant that the lessee "shall not, nor will at any time during the term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the premises, or any part thereof, any trade or business of any description whatsoever, without the consent of the lessor or his assigns or the persons entitled as aforesaid in writing." On that occasion it was stated that the Defendants' intention was to open the house as one of their homes, and to take payment from all the persons who were admitted to it, either for lodging or for lodging and board, as they might elect. I came to the conclusion, on the argument before me, that that was a business, and that the opening of a home for that purpose would be carrying on a business in the house, and was a breach of the covenant, and I accordingly granted the injunction.

At the time that I did so I threw out a strong hint to the parties that it might be advisable for them to take the case to the Court of Appeal, in order that on a question so undetermined as the meaning of the word "business" they might, if they thought fit, take the opinion of the Superior Court. That, however, I am sorry to say, was not done. The injunction now stands, and the trustees of these homes, or the persons who manage them, have communicated to the Plaintiff that they now propose to open this home for the admission of girls of the same description, in the same need of lodgings, to be conducted in the same way, with the only exception that no payments now are to be asked from them either for lodging or for board. That being so, by arrangement between the parties, and a very proper arrangement in order to save expense, the question has been brought before me for adjudication on the supposition that the actual opening of the house has taken place on those terms, and that the Plaintiff is now moving to commit the Defendants for a breach of the injunction so awarded by me. I am, therefore, to consider really the question whether the opening of the house for the purpose now mentioned is, or is not, a breach of the covenant contained in the lease.

Mr. *Cozens-Hardy*, who argued the case for the Plaintiff, suggested at once, as was natural, that it follows necessarily from the injunction that was granted before, and from the terms of my judgment, that that was a breach of the covenant, inasmuch as I had said before that I thought the question of profit made no difference, and Mr. *Hardy* urged that the question of payment would make no difference because profit depends upon payment.

The Solicitor-General, on the other side, said that that was not a fair way of treating the case at all. He says: " You ought to dismiss the judgment in the other case entirely from your recollection; you ought to treat this case as a new case altogether; you ought to suppose that this case is brought before you for the first time, of a home being opened for the admission of friendless girls without payment of any sort or description, and an admission which, according to the rules, is to be one which will make them, when they are admitted into the home, guests rather than lodgers," and not only so, but the Solicitor-General urged very strongly upon me that I ought to consider this as if it was the only house opened by the society, as I must call them, and that I ought not to take into consideration that they had other houses in which payment was exacted. I do not entirely agree with the Solicitor-General in that view, and I will give presently one or two reasons why I do not agree with him. But at all events, I shall not be treating his clients unfairly if I adopt his suggestion and look at this case *de novo*, as if it was the first time I had heard the case, and had to consider the case only of the house being opened without payment.

Now, of course it is to be borne in mind, that the covenant, although it contains the largest words with regard to a business (because it is, a business of any description whatever), does not contain words very commonly found in a covenant, which are that the use of the house is to be confined to the use as a private dwelling-house. There is very little authority when you come to search the books as to what the meaning of the word "business" is. Nevertheless there is something to be found in the books, and there is a case which is constantly referred to, that of *Doe* v. *Keeling* (1). I am quoting from p. 98, where the words " being used as a private dwelling-house," were also wanting, but where the word was " business," and where the business which was being carried on was the business of a schoolmaster, which the Court held to be a " business," although it was said to be a profession. Lord *Ellenborough* uses this language, he says (2): " I own I have no doubt that this is a business within the meaning of

(1) 1 M. & S. 95.

(2) 1 M. & S. 99.

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the covenant, and one which is likely to create as much annoyance as can be predicated of almost any business. It surely cannot be contended, that the noise and tumult which sixty boys create, are not a considerable annoyance, as well to the neighbourhood as to the house, from which any landlord may fairly be supposed to be desirous of redeeming his premises; and the exhibition, too, of the boys may be said somewhat to resemble a show of business within the terms of the covenant." That, of course does not arise here. "The intention of the covenant was, that the house should not be converted to any purposes which might be likely to annoy the neighbourhood, and by that means to depreciate its value at any future period when another tenant might be required. But a business of this kind would necessarily produce inconvenience to the neighbourhood, both by the disturbance which the inmates of the house would create, and by drawing to the spot a large resort of persons, such as the parents and friends of the children; and it is therefore that species of business which would have most prominently offered itself as fit to be excluded." And then he says, "and as to the intention, if the party had it in his contemplation either to secure his own privacy or that of the neighbourhood, there can be no doubt that this is a species of business that he would have particularly excluded. He has not done so by express words; but still the words are sufficient, and the intention is clear." Mr. Justice *Le Blanc*, says (1): "I do not think that the meaning of the parties can be fairly confined to trade, because they have used in addition the word 'business,' which must be intended of something not falling within the description of trade. The question then is, whether a school, to which the public at large are invited to send their children, does not fall within the words of the covenant. I think it does; and if so, there is no doubt it falls within the mischief intended to be provided against."

Now I do not know that even on the high authority of Lord *Ellenborough* I could have followed him in considering that I must look to the intention of the lessor only in this matter. If his Lordship had said the intention of both parties, I could have understood it. But I do not think I am at all justified in imagining what the intention of the grantor or lessor was. I must find his intention in the words which he has used. But using these judgments, I come to this conclusion upon them. In the first place, that "business" means something other than "trade;" in the second place, that whether or not it is a business, certain *indicia* are given here; the one is that all the public, and, of course, as far as the school goes, the boys, are the public, speaking generally, the public are invited to go; the second, is the number of persons in the home would be much larger than those in a private house; and, thirdly, all manner of persons would be induced to resort to the house because of the persons who are living in it.

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(1) 1 M. & S. 100.

Starting from this conclusion, I come to consider what exactly is this house which it is proposed to open, and I think I shall find all these *indicia* are to be found in regard to this particular house. I have referred to two or three passages in the report, and I find that, taking them in the order of their pages, at p. 29, speaking of *Morley House*, which is one of the houses, it says: "Since 1880, 268 young women have dwelt here, and during 1882, 101 have availed themselves of its shelter. These figures are perhaps less than might have been expected; but they are accounted for by the fact that twenty have lived here for twelve months, and ten for more than six months." Then I think there is another place in which they speak of the stabling of one house that might fall into possession before very long, which will enable them to accommodate twenty-eight beds. Then I come to p. 54, and I find this: "To any who have the opportunity of making the homes known among girls and women, the honorary director will be pleased to send hand-cards containing the addresses of the homes and particulars as to terms, &c. To others, who are able to hang them in workrooms, offices, class rooms, or public rooms, he would also forward, carriage paid, prettily mounted and varnished advertisement notices." Then I find further on, at p. 86, this advertisement: "Any of the homes can be visited and inspected daily between the hours of 3 and 5 P.M., and the committee would be glad to know, that some friends do, from time to time, visit the houses and thus see for themselves to what extent the home-life arrangements are carried out, and also judge for themselves of the benefits accruing therefrom." So much for the report.

Now I come to the proposals which are stated in the letter of

Messrs. *Nisbet & Daw*. It says: "This house is intended by the committee for the free use of working girls and young women between the ages of fifteen and twenty-five who are without situations and temporarily unable to support themselves. All applications for admission to be made personally to the superintendent, with whom will vest the right of refusing admission without alleging any reason, and to whom satisfactory references as to respectability must be furnished." And it says "that no charge will be made, and those who are admitted are to consider themselves as guests;" and it contains, amongst other things: "The superintendent, however, wishes it to be understood that the residents will be expected to attend the morning and evening family prayers in the house, and also to attend Divine service every Sunday at some place of religious worship to be approved of by her, and to render her, if she wishes it, cheerful assistance in the performance of the domestic duties of the house." Now, I gather from that, and also from a note in the report with regard to superintendents, that there are paid superintendents who live in these homes. I am not absolutely certain about the payment, but I gather from one clause in the report, that the superintendent is neither the lessee nor the owner of the house; that they invite persons to make application to the superintendent for admission; that they invite other persons—the public generally—to resort to the house between 3 and 5 o'clock to inspect the house; that in all probability if young women are living in these homes and want to obtain situations, application will be made to the superintendent as to their character. Therefore for every purpose for which I can see that the home is to be used, with the single exception of young women actually lodging and boarding there, they are purposes quite outside the ordinary domestic life of persons. The house is not to be replenished with guests, as the Solicitor-General said, in the ordinary way in which a person invites guests to his house. It is the public who are invited—so much of them as are young women of fifteen to twenty-five who want a home. They are invited to come and ask to be admitted, which is what your guest commonly does not do. They are to be received, not in the ordinary way in which a person receives his guests, but they bring a testimonial of respectability, and, of course, they bring proof of their want of accommodation. Under all these circumstances I think it is absolutely diverse from and outside the domestic life of a house, and if I were to add anything to the unsuccessful attempt I formerly made to define "business," I should say that is a business which is carried on by any person in addition to, and diverse from, his ordinary domestic life, and this, to my mind, is something which is carried on by the society not being ordinary domestic life at all, but being a business for which they solicit subscriptions, and which they carry on by means of those subscriptions.

I am of opinion, therefore, in this case also, notwithstanding there is to be no payment, that it is nevertheless a business, and is in contravention of the terms of the covenant.

I may add that I have looked at it now, as the Solicitor-General invited me to do, as if this were the only home, but I find it exceedingly difficult to say that that is the proper and right way of looking at the matter. It is one home out of many, and I think in order to judge whether it is a business or not, I am entitled to know that it is one home out of many, and if the other homes are decided to be businesses, I feel it difficult to say that this, which is one of them, is no business, whereas all the rest are businesses.

I came to this conclusion early in the argument yesterday, but out of respect to the argument which has been addressed to me on the other side, I thought it right to reflect upon it. I see no reason to alter the conclusion at which I had arrived, and I must, therefore, I presume, make this order:—The Court being of opinion that the home proposed to be opened would be a business in contravention and breach of the covenant in the lease, and the trustees undertaking not to open the home in that way, no order except that they pay the costs of the application.

T. W. G.

C. A.

The Defendants appealed from this order, and also from the previous order of the 23rd of November, 1883. The appeal was heard on the 20th of May, 1884.

Sir *F. Herschell*, S.G., and *W. W. Karslake*, Q.C. (*Birrell* with them), for the Appellants:—

The Appellants have not violated the covenant by opening the

"Home for Working Girls," whether they receive payment for board and lodging or not. No profit was ever intended to be made; and now that they have given up the intention of taking any payment, there can be no pretence for saying they are exercising a trade or business. The covenant is merely a negative one, and does not go on to bind the lessees to use the house as a private residence. Therefore, the only question is, whether this is the exercise of a trade or business. We say it is the exercise of hospitality, not of a business. A business means that by which a man gains a livelihood. The authorities relied on by the other side are not applicable. In *Bramwell* v. *Lacy* (1) the hospital was a nuisance, and in *German* v. *Chapman* (2) the covenant precluded the premises from being used otherwise than as a private dwelling-house.

Cozens-Hardy, Q.C., and *Butcher*, for the Plaintiff:—

The Defendants are not using the house as a dwelling-house, but have fitted it up and intend to use it for a definite object of a different kind. They are associated together, and invite subscriptions from the public for this object. Therefore, their user has two of the indicia of a business, namely, publicity and a definite object distinct from dwelling in the house.

[Cotton, L.J.:—If a man receives into his house his nephews and nieces from *India*, and furnishes his house with that object, should you call that a business?]

Certainly, whether he received payment for them or not. A school is a business, and it can make no difference whether the scholars are paid for or not. The question is whether the object of taking the house is to receive lodgers, or the receiving of them is merely accidental. We admit that a house may be used accidentally for various purposes, either for the sake of amusement or of hospitality, but if the object of keeping up the house is to carry on some particular occupation, then it is used for a business: *Doe* v. *Bird* (3); *Smith* v. *Anderson* (4); *German* v. *Chapman*; *Bramwell* v. *Lacy*; *Doe* v. *Keeling* (5). In *Portman*

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(1) 10 Ch. D. 691.
(2) 7 Ch. D. 271.
(3) 2 Ad. & E. 161.
(4) 15 Ch. D. 247.
(5) 1 M. & S. 95.

v. *Home Hospital Association* (1), it was held that the carrying on of a hospital or similar association, without a view to profit,

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(1) M. R. Dec. 1, 1879.

PORTMAN *v.* HOME HOSPITAL ASSOCIATION.

IN this case the lease of a house contained a covenant not to use the premises hereby demised, or any part thereof, or permit the same or any part thereof to be used in the exercise or carrying on of any art, trade, or business, occupation, or calling whatsoever.

The Defendants were an incorporated association, the objects of which were to provide accommodation for patients willing to pay for it, for providing medical attendance, nursing, food, and medicine, and all appliances of a medical and surgical character, and the comforts and advantages of home in various degrees according to the payments made by the patients. Infectious diseases were not included, and the only persons to be admitted were the members, who all paid a certain sum, or were nominated in a particular way.

The lessor brought an action and moved for an injunction to restrain the Defendants from using the house for the purposes of the association.

Southgate, Q.C., *Chitty*, Q.C., *Davey*, Q.C., *A. T. Watson*, *Ribton*, and *Methold*, appeared for the various parties.

JESSEL, M.R.:—

I have no doubt whatever as to the decision which I ought to give in this case. The difficulty I feel is to define the meaning of the terms used, so as not to include some case not intended to be included; but that the terms used include this case appears to me quite plain. The covenant is that the lessee should not use the premises, or any part thereof, or permit the same or any part thereof to be used in the exercise of any art, trade, or business, occupation, or calling whatsoever. The terms "use or permit to be used" seem to me to get rid of much of the difficulty, because the accident of something taking place in the house is not permitting the house to be used for that purpose. Suppose, for instance, that a man residing in a private dwelling-house calls in a physician, because he or any member of his family is ill. The physician could exercise his calling or occupation in the house, he could use the art of healing, and perhaps receive his fee before leaving the house, but I should not hold that to be a breach of the covenant, because it is not using or permitting the house to be used. It would be a mere accident, not that to which the use of the house is devoted. Now, suppose instead of this you take a collection of any patients who may come, which, as I understand, is intended here, of thirty or forty in number, and then call in a physician who receives his fee, you are using the house for that very purpose. Your object is to get them into that house, and to use the house for allowing the physician to exercise his calling there, and it appears to me that that shews the distinction between the using or permitting the house to be used, and the accident of the patient being in the house. The very object of the Defendants in this particular case is, that the patient shall come to that house or home for the purpose of being there visited by the physician, who shall there exercise his calling. It is emphatically the use of the house for was a violation of a covenant not to carry on "any art, trade, business, occupation, or calling."

Sir *F. Herschell*, in reply.

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that very purpose, and it appears to me that under the word "art" alone such a use of the house is prohibited. I may give a further illustration. Many physicians in *London* do not reside at the place where they receive their patients. A man may hire a consulting room, with a room or two adjoining, and there consult with his patients, who are living at a distance, perhaps, in the country. The consulting room is the place where he exercises his art or calling, and those rooms are used for that purpose. Suppose that physician having left those rooms, goes back to his own house, and a patient having arrived too late at the consulting room, takes a cab and goes after him. In such a case the patient would see the physician in his own house by an accident. I should not call that the using of the private dwelling-house of the physician for the purpose of carrying on his calling, because that is not the use of it. It is not the using of the house, but the accident of the physician being in the house. I might illustrate that further by supposing that the physician had gone to another patient's house, and was followed by the first patient, you would not say that the physician used the other patient's house for the purpose of carrying on or exercising his calling, though he happened to be there when he did, in fact, so exercise his calling.

What is forbidden is allowing the place to be used for that purpose, and what is done appears to me to be exactly within that part of the covenant. I think also that it is within another part of the covenant. The question is what is the meaning of "any occupation or calling whatsoever." It is suggested on the part of the Defendants that that means where you get a profit. I cannot accede to that. I do not think profit is the test, but the use of the house for the purpose. A man may have an occupation from which he does not get any profit, and never intends to get any profit. He may have as an occupation the printing and publishing of papers, or books, or pamphlets, for a charitable society for which he charges nothing. It may be carried on, as it is in some cases, by an officer of the society who is not paid, and who does it from charitable and benevolent motives. Can that make any difference? The using of the house for that purpose is a using it for some occupation or calling. The occupation of the man's life may be that, and no other. I have heard of a man occupying his time, in fact, making the occupation of his life, the practice of philanthropy. When you come to look at the meaning of the word "occupation," it is, such an occupation that you can use a house for it, that is, something done in the course of the user of the house which shews that it is used for that occupation. It would be very ridiculous to say that opening a bookseller's shop by a man is the using of a house within the meaning of the words "exercise or carry on any art, trade, or business, occupation, or calling whatsoever," and at the same time to say that the identical user, in every respect, except that a man does it

1884. May 28. Cotton, L.J.:—

This is an appeal from two orders of Mr. Justice *Pearson*. One was an order granting an injunction restraining the Defendants from using a house of which the Plaintiff is landlord as a girls' home, and the other was an order declaring that what was afterwards proposed to be done would be a breach of that injunction, and therefore would be a contempt. The parties have

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from benevolence or charitable motives, is not to be so treated. I will give another illustration; I will go back to the physician and the consulting room. The physician who uses the consulting room for the purposes of seeing his patients there is clearly using it for the purpose of his occupation or art. Suppose that, instead of seeing his patients at his own rooms, he is a physician to a public dispensary, or the physician in charge of the out-patients in any of our large hospitals. He then goes, not to his own consulting rooms, but to the room of the dispensary or hospital. Does not he use that room for the purpose of his occupation? And suppose he has no other practice—some of them have no other practice—for what purpose does he use the consulting room of the hospital? Surely in the exercise of his occupation or calling, his calling being that of a physician. It cannot make any difference that he gets no fees; that he does not get paid, and does not attempt to get paid. He still uses that room for the purpose of his calling or occupation, and really it is far better to look at the ordinary meaning of the words and see whether they apply to this case, than to attempt to lay down some definition which may err on one side or the other. It appears to me that this is a user for that purpose. Now I come to a third point, which I think is equally against the Defendants, though I am sorry for it, because I think this is a useful institution and one that should be encouraged. What is the occupation of the Defendants? They are a corporation incorporated for a particular purpose, and I must say they intend to have an occupation, and I hope will have a very considerable one. Now let us see. What is their occupation? [His Lordship stated the objects of the association, as above set out, and continued:—] It is open in fact to the whole public who can afford to pay those sums. That is the occupation of the association. I suppose I cannot understand any meaning of the word "occupation" which would not describe this as being such occupation. Are the Defendants going to use the house for that purpose? They are there for no other purpose whatsoever. How can I properly be called upon to say that they are not going to use the house in the exercise or carrying on of any occupation or calling whatsoever? If this is not their occupation they have none at all, and that of course is not a position in which I could place the association.

It seems to me to be perfectly plain that the keeping of a hospital by a hospital association, and the user of the house for the purpose of keeping that hospital, is a user for the purpose of that occupation, and a breach of the covenant. I regret the result, but I must administer the law as it stands and grant the injunction.

acted in a most reasonable way. The Plaintiff, the landlord, is protecting not only his property, but the other residents on it, and he and the Defendants have taken the shortest possible means of ascertaining whether the original scheme, or the modified scheme proposed to be adopted, is, or is not, to be restrained. The Plaintiff is landlord, as I have stated, of a house of which these Defendants are underlessees, and the object of this action is to enforce a covenant contained in the original lease. The Defendants who are now appealing are the trustees of a charity, the nature of which I shall have presently to consider. The covenant is this: "Further that the said *James Russell*"—he is the original lessee—"his executors and administrators shall not, nor will at any time during the term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or on the premises hereby demised, any trade or business of any description whatsoever without the consent of the Plaintiff." Now this covenant evidently had for its object to keep this house as a residence or dwelling-house, but the covenant does not, as is very usual in these clauses, contain any restriction against using the house "otherwise than as a dwelling-house," or say that it shall "only be used as a private dwelling-house." What we have to consider is, whether what is proposed to be done, and has been done by the Defendants, is, or is not, a breach of the covenant upon the fair construction of the words used, and of course we must construe these words with reference to what is the apparent object of this covenant, although it does not contain the usual words which I have mentioned.

Now, the Defendants who are now appealing, are trustees of what appears to me to be a most admirable institution, though of course, that cannot affect our decision in any way. They are a nobleman and certain gentlemen who combine together for the purpose of raising subscriptions for providing homes for working girls. In this house, and in other houses which they have obtained, they have a resident and paid superintendent, and they provide rooms, and board also, for girls who have not any home of their own, and who are working in *London*. They invite all the members of the public to assist in getting the girls to find a home in these houses, and they have no connection with the girls except this, that those girls who want a home, are, if they come, provided, subject to certain regulations, with a home in these houses, in which there are bedrooms, and a common sitting-room, and where they are provided with board.

The case came before Mr. Justice *Pearson* on two occasions, when he made the orders now appealed from under somewhat different circumstances. In the first instance, the Defendants were receiving payment from those girls who occupied rooms and availed themselves of the benefit of this home, and the injunction was granted to restrain the Defendants from using the house in that way, on the ground that such user was a violation of the covenant. Then, by arrangement and correspondence between the parties, what the Defendants determined to do was, not to receive any payment, but to make the benefits conferred on the girls entirely gratuitous. The question is whether what they are doing is a business; it is not a trade. The words are "trade or business" and there can be no question that the Defendants are not carrying on any trade. The question then is, is what they are doing a business?

I cannot read the two words "trade" and "business" as synonymous. There may be a great many businesses which are not trades, and although, in my opinion, receiving payment for what is done, using what you are doing as a means of getting payment with a view to profit—whether profit is actually obtained or not, must of course be immaterial—is certainly material in considering whether what was being done is, or is not, a business, yet, in my opinion, it is not essential that there should be payment in order to constitute a business. And the mere fact that there is payment under certain circumstances, does not necessarily make a thing a business which if there was no payment would not be a business. In my opinion, in the present state of things, what is now intended to be done does not put the matter in a different position from that in which it stood when the Defendants received payment, because that payment was not a payment in the ordinary way for the purpose of getting profit if they could—it was not to constitute this a business for the purpose of profit—but it was simply a payment to go towards the charity in order to aid the funds of the charity. In my opinion, it really does not make any difference that the Defendants are not now receiving any payment. If without payment this scheme would not be a business, in my opinion, having regard to the mode of payment and the object for which the payment was required, payment would not make any difference. But one has to consider whether this is carrying on a business, and I come to the conclusion that Mr. Justice *Pearson* is right in the view which he has taken, that it is. It has been urged upon us very strongly that it is no business at all, but a charity; that the Defendants, in making a home for these girls are treating them simply as guests, and that receiving any number of guests or any number of friends into a house cannot be said to be carrying on a business in that house. I quite agree that bringing guests into, or having any number of guests or friends in, your house is not in any way carrying on a business. But what is done here? None of the Defendants are residing in the house, nor are they receiving into their house as their guests or friends, these girls who make their home there. The Defendants have a paid superintendent who manages the house for them, and it is the duty of that paid superintendent so to manage the house, and to see that the girls who are there conduct themselves properly, and in accordance with the rules and regulations of the charity, and provision is made as to the way in which they are to be accommodated. It is not that any particular individuals known to Defendants or whom they treat as their friends (except so far as they wish to be the friends of all those who are in distress) are admitted, but that all the public who are objects of this charity, on submitting to these regulations, are admitted into the house which they occupy. It might well be that the Defendants if they liked to do this in a house which they occupied might do so, but when they do so in a house in which they pay a superintendent in order to receive the girls, these girls are really lodgers. They lodge there, and although the trustees are, with a most praiseworthy object, using this lodging-house for the purpose of charity, nevertheless, in my opinion, although the lodging is given gratuitously, what is being done must be considered as carrying on the business of a lodging-house. Therefore, unhappily, these trustees, in my opinion, cannot, having regard to this covenant, use the house which belongs to the Plaintiff even according to this modified scheme. In my opinion, therefore, this appeal fails.

Lindley, L.J.:—

I am of the same opinion. The question we have to determine is whether this covenant, which is a very simple one, is being infringed or not. The covenant is that the lessee will not use, exercise, or carry on, or permit or suffer to be used, exercised or carried on, on the premises, any trade or business of any description without the consent of the Plaintiff.

Now the first question to be considered is what is the object of this covenant? The covenant must be construed consistently with that object, and on the other hand, something may fall within the scope of the covenant which does not fall within the words. One must look, therefore, at both the words and the object. The necessity of doing both may be made apparent by putting an illustration. If you take the words of the covenant simply, without looking at the object, it would prevent a private family from having their victuals cooked in the ordinary way on the premises, that is to say, by a cook, whose business it is to cook the victuals. The words in this covenant are that no business shall be allowed to be carried on, and it would be ridiculous to construe the covenant as extending to any such business as that. You must look beyond the words, to the object of the covenant, and, looking to the object of the covenant, one sees plainly what it is. The house was a dwelling-house; it is so described in the lease. It was let as a dwelling-house, and this covenant was inserted in the lease. Well, what is the object of that covenant? There can, I think, be but one answer to that question. It was to prevent the house being used otherwise than as a dwelling-house. I think that is conceded on all hands. It is very true that this covenant does not go on, as such covenants usually do, "And not to use the house or allow it to be used otherwise than as a private dwelling-house." But that is the object of the whole thing, and if those words were not implied the covenant would be senseless. Another question is, what sort of a dwelling-house is it to be, because dwelling-houses are of various kinds? For example, hotels are dwelling-houses of a certain kind; persons eat and drink and sleep there, and do nothing else that I know of except cook meals, and so on. Is that the kind of dwelling-house that is meant? I apprehend not. I think that, although a dwelling-house was contemplated, keeping the house as an hotel would fall within the words and object of this covenant, because the hotel-keeper would be carrying on a business, and the business which he carried on would be one which it was the object of this covenant to prevent. What are the Defendants doing? The Solicitor-General made a great point of the fact that it was impossible to say what kind of business this was. I do not think myself that is conclusive, it is quite possible to have new businesses which have not yet got names. But I do not think that difficulty as great as he thought it. When we understand what is being done it strikes me that it is not difficult to give a name to this business. I should call it the business of a lodging-house keeper. It is very true it is a charitable lodging-house, but what is being done? The Defendants are associated together for the purpose of finding a home for these working girls, and they invite them to come and board and lodge there. They do not take any payment now—I do not think that is material—but they have a staff. They have a superintendent in this house whose business it is to look after the lodging-house, and that appears to me to fall both within the words of the covenant and within the mischief. That it is within the mischief I am afraid is too plain; persons complain of it, and it is clear that it was not the kind of thing that was contemplated when the covenant was entered into. But the great difficulty is, is it within the words? Can it be said to be carrying on, or allowing to be carried on a business, on these premises? When we look into the dictionaries as to the meaning of the word "business," I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business—I do not think we can get much aid from the dictionary. We must look at the words in the ordinary sense, and we must look at the object of the covenant; and, looking at both, I have no hesitation in saying

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that this is clearly within the words and within the object of the covenant. I think the view of Mr. Justice *Pearson* was correct, and that the appeal ought to be dismissed with costs.

Solicitors for Appellants: *Nisbet & Daw.*
Solicitors for Plaintiff: *Markby, Wilde, & Burra.*

M. W.

Observations of FRY, L.J., at p. 104, *applied.* GALLAGHER *v.* SHILCOCK. [1949] 1 All E.R. 921.

Applied. GALLAGHER *v.* SHILCOCK. [1949] 2 K. B. 765

Considered. SMITH *v.* HAMILTON [1951] 1 Ch. 174

HOWE *v.* SMITH.

[1881 H. 3315.]

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March 31; *April* 1; *May* 29.

Vendor and Purchaser—Forfeiture of Deposit—Purchaser's Failure to complete.

On a sale of real estate the purchaser paid £500, which was stated in the contract to be paid "as a deposit, and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and, after repeated delays, the vendor re-sold the property for the same price.

The original purchaser having brought an action for specific performance, it was held by the Court of Appeal, affirming the decision of *Kay*, J., that the purchaser had lost by his delay his right to enforce specific performance:—

Held, also, that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the Plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit.

Palmer v. *Temple* (1) distinguished.

THIS action was brought for specific performance of a contract for sale of certain freehold lands known as *Hill's Farm*, in the county of *Middlesex*, for £12,500.

The contract was dated the 24th of March, 1881, and thereby the Plaintiff, *T. H. Howe*, agreed to purchase the premises in question "for the price of £12,500, £500 part thereof having been paid on the signing of this agreement as a deposit and in part payment of the purchase-money." Various stipulations were made as to the title, and it was agreed that the purchaser should pay the balance of the purchase-money on the 24th of April,

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(1) 9 Ad. & E. 508.

1881, and that if any delay should take place from any cause whatsoever except the default of the vendor, the purchaser should pay interest at £5 per cent. on the balance of the purchase-money. And it was further agreed (clause 8) that if the purchaser should fail to comply with this agreement the vendor should be at liberty to re-sell the premises in any manner, and the deficiency on such second sale thereof, with all expenses attending the same, should be made good by the defaulter at this present sale, and be recoverable as liquidated damages.

The purchaser at first objected to this clause, but it was eventually retained, the vendor undertaking not to act upon it for six weeks after the 24th of April, 1881.

The purchaser paid the deposit of £500, and an abstract was delivered according to the agreement.

After some negotiation the purchaser sent a draft conveyance to the vendor, on the 23rd of May, which was approved on the following day on behalf of the vendor.

The completion of the purchase was however delayed by the purchaser, and the vendor, after pressing for completion, agreed, on the 20th of June, 1881, to extend the time for completion for a month, on payment of certain costs, but at the same time warned the purchaser that unless the purchase-money was then paid he should re-sell the property.

On the 25th of July the purchaser, fearing that the vendor would re-sell the property, brought the present action against the vendor for specific performance of the agreement.

On the 31st of January, before the defence was delivered, the vendor re-sold the property at the original price. In his defence he relied on the delay of the Plaintiff as justifying a rescission of the contract.

The action was heard before Mr. Justice *Kay*, on the 27th of February, 1883, when his Lordship dismissed the action with costs, being of opinion that the Plaintiff had precluded himself by his delay from insisting on the completion of the contract.

From this judgment the Plaintiff appealed.

W. Pearson, Q.C., and *Batten*, for the Appellant:—

Time was not of the essence of the contract; and there was no such delay on the part of the purchaser as to deprive him of his right to enforce specific performance of the contract. But if the Court should be against us on this point we claim the return of our deposit; and, if necessary, we ask for leave to amend the statement of claim in order to raise that question.

COTTON, L.J.:—We are all of opinion that the Plaintiff is not entitled to enforce specific performance in this case, and we do not desire to hear any further argument on that point. But we think, subject to what may be said on the other side, that the Plaintiff ought to have leave to amend the statement of claim in order to claim the return of his deposit. We therefore wish to hear the counsel for the Defendant on that point, which was not raised before Mr. Justice *Kay*.

Hastings, Q.C., and *Kingdon*, for the Defendant:—

The Plaintiff has forfeited his deposit by his own default. The deposit is not merely part payment of the purchase-money, it is a guarantee that the contract should be performed: *Collins* v. *Stimson* (1); *Essex* v. *Daniell* (2); *Ex parte Barrell* (3); *Depree* v. *Bedborough* (4); *Hinton* v. *Sparkes* (5); *Casson* v. *Roberts* (6). The fact that there has been a re-sale by the vendor makes no difference. It is outside the contract, and cannot purge the default of the purchaser; nor does the purchaser's present willingness to perform the contract alter his position; his default has placed him in the same position as if he had refused to perform it.

But, assuming that the purchaser has a right to a return of the deposit, it is subject to the vendor's claim for damages: *Laird* v. *Pim* (7); *Icely* v. *Grew* (8).

W. Pearson, in reply:—

The question whether the deposit is forfeited depends upon the terms of the contract. If the purchaser had refused to perform the contract it may be that he would have forfeited his deposit, but here the vendor abandons the contract and nevertheless claims

(1) 11 Q. B. D. 142.
(2) Law Rep. 10 C. P. 538.
(3) Ibid. 10 Ch. 512.
(4) 4 Giff. 479.
(5) Law Rep. 3 C. P. 161.
(6) 31 Beav. 613.
(7) 7 M. & W. 474.
(8) 6 Nev. & M. 467.

the deposit. There is no case that goes so far as that: *Gee* v. *Pearse* (1) is very similar, and there the vendor had to return the deposit. *Palmer* v. *Temple* (2) is directly in our favour, and that is recognised as good law in *Sugden's* Vendors and Purchasers (3). With respect to the claim by the Defendant to deduct damages, he has not shewn that he has sustained any, for he sold the property for the original price; and if he has, he cannot claim damages, because he has himself put an end to the contract.

1884. May 29. COTTON, L.J.:—

This was an action for the specific performance of a contract for the purchase and sale of land, the Plaintiff, being the purchaser, seeking to insist on specific performance. At the hearing of the appeal we decided the only point raised by the Plaintiff by the pleadings, viz., that in consequence of the delay the Plaintiff was not entitled to the equitable remedy of specific performance, which is only granted to those who are ready and prompt. But the counsel for the Appellant asked liberty to raise a claim to the return of the deposit, the deposit being £500, which had not been raised in the Court below, and he asked leave to amend his statement of claim, and we gave the leave, and considered the necessary amendments made.

Now the claim for this return of the deposit of £500 is essentially a claim at Common Law, and one which has not arisen in Equity except in bankruptcy cases, and that accounts for the little authority there is on the point. The first thing one must look at is the contract. The contract contains no clause at all as to what is to be done with the deposit if the contract is not performed. It states that "£500 part of the purchase-money of £12,500 has been paid as a deposit and in part payment of the purchase-money." There is nothing else which is material, but there is a clause, clause 8, which I must read (as it was relied on, having regard to a case which I shall refer to) as giving the Plaintiff the right to the return of the deposit. It is this: "If the purchaser shall fail to comply with this agreement the vendors shall be at liberty to resell the premises in any manner, and the deficiency on such second sale thereof, together with all expenses attending the same, shall be made good by the defaulter at this present sale, and be recoverable as liquidated damages."

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(1) 2 De G. & Sm. 325.
(2) 9 Ad. & E. 508.
(3) 14th Ed. p. 40.

It was contended that, having regard to the case of *Palmer* v. *Temple* (1), this had fixed what was to be the penalty imposed on the purchaser if he made default—that this was to be the only liability in the case of default, and therefore the deposit must be returned to the purchaser, of course subject to any claim which there might be to any sum to be deducted in respect of deficiency under the sale.

Now that case, no doubt, did lay down that under that contract the parties had settled what was to be the result of a default, but that was on a somewhat different provision from this. It was under a provision which laid down that if either vendor or purchaser made default a sum of £1000 should be paid as liquidated damages. It may be that this clause induced the Court to come to the decision which they arrived at in that case, and that they thought the vendor was precluded by it from retaining the deposit in consequence of the default of the purchaser. That decision turned on the express terms of that proviso, which is different from the proviso in the present case. If so, of course it is no authority here; but if that case is taken as laying down this proposition (which I do not think it could have done), namely, that such a clause, however varied in terms, would prevent the vendor on the default of the purchaser from retaining the deposit, I cannot agree with it, and do not feel bound to follow it. In my opinion this is a clause which merely fixes the amount which the vendor is to be entitled to if he follows the course which is there pointed out—it fixes the amount which he is to claim in that event; but, in my opinion, if the vendor had irrespective of that clause a right to retain the deposit under the circumstances existing in the present case, this clause would not give the purchaser the right to recover the deposit. The mere fact that there has been a re-sale, even if it were under this clause which is in dispute, in my opinion can make no difference if the purchaser had made such a default as precluded him from demanding the transfer of the estate. That being so, when the vendor sold the estate he was only selling that which the purchaser had no possible right to demand, and his doing so cannot, in my opinion, affect the rights of the vendor and purchaser to the deposit.

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(1) 9 Ad. & E. 508.

But there is something more to be considered. In *Palmer* v. *Temple* (1), undoubtedly, the Judges did say that independently of contract the vendor cannot on the default of the purchaser retain the deposit, and there are similar expressions in other cases. There is a similar expression of opinion in *Hinton* v. *Sparkes* (2), and I think similar expressions of opinion in other cases at Common Law. But that, as I understand the expression used by Lord *St. Leonards*, in his book on Vendors and Purchasers, is not in accordance with his view; for he says there (3), "Where a purchaser is in default and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit; for he cannot, by his own default, acquire a right to rescind the contract." Then he goes on and states his opinion that the mere re-sale of the estate after the purchaser's default cannot in any way affect the right of the vendor to retain the deposit.

Then we have a case of *Collins* v. *Stimson* (4) in which Baron *Pollock* refused to order the return of the deposit under circumstances somewhat different from this. What he says is this, "According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit." That was the principle of his decision.

But the case does not quite stop there. There is a decision under somewhat different circumstances from the present case in *Depree* v. *Bedborough* (5), where there was a purchase under a sale by decree of the Court. I will not refer further to that case, but it is in accordance with a subsequent decision of the Court of Appeal in *Ex parte Barrell* (6), where the purchaser had become bankrupt, and the trustee in bankruptcy had disclaimed the contract under which he sought to recover the deposit. That was

(1) 9 Ad. & E. 508.
(2) Law Rep. 3 C. P. 161.
(3) 14th Ed. p. 40.
(4) 11 Q. B. D. 142, 143.
(5) 4 Giff. 479.
(6) Law Rep. 10 Ch. 512.

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refused. What Lord Justice *James* says is this (1), "The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, Give me back the deposit. There is no ground for such a claim."

There is a variance, no doubt, in the expressions of opinion, if not in the decisions, with reference to the return of the deposit, but I think that the judgment of Lord Justice *James* gives us the principle on which we should deal with the case. What is the deposit? The deposit, as I understand it, and using the words of Lord Justice *James*, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice *James*, he can have no right to recover the deposit.

I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. In those circumstances, in my opinion, the rule is correctly laid down in Lord Justice *James's* judgment (of course the case there was stronger than the one we have to deal with) where the representatives of the purchaser had neither in law nor in equity the right to the return of the deposit.

(1) Law Rep. 10 Ch. 514.

What are the facts here? The contract was to be performed according to their arrangement on the 24th of April. It is not necessary now to enter into the question how far time would be considered as of the essence of the contract, because since the *Judicature Acts,* when the question whether time is of the essence of the contract arises, all contracts must be governed by the rules of Equity concerning that subject.

What took place was this. Not only was the contract not performed on that day, but there was a delay from time to time, the purchaser asking for, and at one time, under terms of payment of costs, obtaining an extension of the time. He obtained it knowing that the vendor considered it of importance, as it was of importance, that the contract should be performed, if not to the very day, at least within a reasonable time. It was not performed within a reasonable time, and from the conduct of the purchaser, as I read the letters and understand what took place, I come to the conclusion that he never was up to, and even at, the time when he brought this action, ready with the money to perform the contract. He was not ready with the money in order to purchase the estate, and at the time when the action was commenced if the vendor had said, "Where is your money? Produce it, and then I will make the conveyance," he would not have been able to produce the money.

In my opinion, without at all laying down that whenever the Court refuses specific performance it will allow the vendor to retain the deposit, in this case and under this contract the purchaser has so acted as to repudiate on his part the contract, and he cannot under those circumstances take advantage of his own default to recover this deposit from the vendor. Therefore on this point also the appeal fails.

BOWEN, L.J.:—

I am of the same opinion.

The purchaser in this case has no right, according to our decision pronounced on a previous day, to insist on the specific performance of the contract for the sale of the property. But it was urged at the last moment by Mr. *Pearson* that at all events in the alternative he was entitled to the return of his deposit money;

and treating the pleadings as amended for that purpose, we agreed to consider that alternative claim as if it had been raised on the pleadings in the way in which, whatever may have been the practice before the *Judicature Act*, I myself can see no reason why it should not be raised now. We have, therefore, to consider whether under the circumstances of this special case the purchaser has lost his right to the return of this deposit money.

The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made. If any authority were wanted to prove that in each case it is a question of construction (I do not think it is wanted) it would be found in *Palmer* v. *Temple* (1), the case to which Lord Justice *Cotton* has referred, and which—whatever may be the value of the case as an authority on the construction of the contract in that case, as to which I agree with everything that has fallen from Lord Justice *Cotton*—adopts the principle that in each case we must consider what was the bargain. At page 520 there is this observation: "The ground on which we rest this opinion is, that in the absence of any specific provision, the question, whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument."

In the present case we have in the first place, turning to the language of the instrument, a description of the manner in which the money is staked or deposited. It is a deposit, and it is to be both a deposit and in the nature of part payment, and there is further a special clause in the contract at which we ought to look to see if any light is thrown by it on the language of the provision that the money is deposited as a deposit.

We may however pass by that special clause, for I think it does not really deprive the deposit in this case of the character which it would bear if there were no special clause—because, in my opinion, that clause merely fixes the amount which the vendor is to receive in the event of his insisting on his rights under the special clause. We have therefore to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term "deposit." Without going at length into the history, or accepting all that has been said or will be said by the other members of the Court on that point, it comes shortly to this, that a deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase? But in what sense is it a security for the completion of the purchase? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong. Mr. *Pearson* said the rule is different when the purchaser does not insist on abandoning his contract, but, on the contrary, is desirous, at the moment he appears before the Court, of completing it, and therefore neither the principle nor the decisions apply—that this is not a case where the purchaser is receding from the contract, but on the contrary he is seeking to enforce it. It seems to me the answer to that argument is that although in terms in a case like the present the purchaser may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused, and has given the other side the right to say that he has refused, performance. He may look as if he wished to perform, but in reality he has put it out of his power to do so—he has, in the language of the Roman law, receded from his contract.

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(1) 9 Ad. & E. 508.

In every case at law, it seems to me, the question whether time is of the essence of the contract must depend, just as the question of the deposit must depend, on the contract itself. It is not necessary in the present instance to consider whether under this special contract time was of the essence of the contract or not, because the *Judicature Act* has placed the matter as regards such proposition on the footing on which it would have been treated in Equity before the *Judicature Act*. But it is obvious that the party may lose his right to insist on specific performance before an equitable tribunal, without at the same time having necessarily so acted as to justify the other side in saying the contract is altogether at an end. As I understand, speaking with a due consciousness of my own ignorance on the point, all that a Court of Equity does when it refuses specific performance on the ground of lapse of time is to leave the parties to their remedy at law. It refuses it because it would be unfair that the relief should be given. It does not follow as a matter of law on principle that because specific performance is refused therefore the whole contract is at an end in law. We have to look to the conduct of the parties and to the contract itself, and, putting the two things together, to see whether the purchaser has acted not merely so as to break his contract, but to entitle the other side to say he has repudiated and no longer stands by it.

Now, looking to see whether the conduct of the purchaser has not in the present instance brought him within that definition, I think it is impossible, viewing the case from first to last, to doubt that he has so dealt with his bargain as to give the vendor a right to allege, if he chooses so to say, that the contract is at an end, that the purchaser has receded from the bargain, and that the deposit money is liable to be retained by the vendor. Therefore the appeal fails.

Fry, L.J.:—

On the 24th of March, 1881, the Defendant and Plaintiff entered into an agreement in writing, by which the Defendant agreed to sell and the purchaser agreed to buy certain real estate for £12,500, of which £500 was in the contract stated to have been paid on the signing of the agreement as a deposit and in part payment of the purchase-money. The contract provided for the payment of the balance on the 24th of April, 1881, and it further provided by the 8th condition that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell the premises, and the deficiency on such second sale thereof, with all expenses attending the same, should be made good by the defaulter and be recoverable as liquidated damages.

The Plaintiff, the purchaser, did not pay the balance of his purchase-money on the day stipulated, and he has been guilty of such delay and neglect in completing that, according to our judgment already expressed, he has lost all right to the specific performance of the contract in equity.

The question then arises which has been argued before us, although not before Mr. Justice *Kay*, whether or not the Plaintiff is entitled to recover the £500 paid on the signing of the contract.

The £500 was paid, in the words of the contract, as "a deposit and in part payment of the purchase-money." What is the meaning of this expression? The authorities seem to leave the matter in some doubt. Some lean in the direction of the view that in the absence of express stipulation the deposit is not forfeited by mere non-performance. Thus, in *Palmer* v. *Temple* (1), a sum of £300 was paid, as in the present case, by way of deposit and in part payment, and the agreement stipulated that if either party should refuse to perform the agreement he should pay £1000 to the other party as liquidated damages; the purchaser made default and the vendor resold the estate, and the Court of Queen's Bench held that the vendor's remedies were restrained by the contract, that he might have sued for the penalty and recovered such damages as a jury might award, "but he cannot," said Lord *Denman*, C.J. (2), "retain the deposit; for that must be considered, not as an earnest to be forfeited, but as part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser." It is to be observed that the Lord Chief Justice does not seem to have given any force to the words of the contract which shewed that the money was paid by way of deposit as well as in part payment.

In *Ockenden* v. *Henly* (3) the question was whether in ascertaining the deficiency on a resale credit was to be given for the deposit or not, and there Lord *Campbell*, in delivering the judgment of the Court, said, "Now it is well settled that, by our law, following the rule of the civil law, a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase-money and not as a mere pledge: *Sugd.* V. & P. ch. 1, sect. 3, art. 18 (13th ed.). Therefore in this case had the deposit been paid, the balance only of the purchase-money would have remained payable. What then, according to the seventh condition, is the deficiency arising upon the resale which the seller is entitled to recover? We think the difference between the balance of the purchase-money on the first sale and the amount of the purchase-money obtained on the second sale; or, in other words, the deposit, although forfeited so far as to prevent the purchaser from ever recovering it back, as, without a forfeiture, he might have done (*Palmer* v. *Temple* (1)), still is to be brought by the seller into account if he seeks to recover as for a deficiency on the resale."

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(1) 9 Ad. & E. 508.
(2) 9 Ad. & E. 520.
(3) E. B. & E. 485, 492.

On the other hand, in *Collins* v. *Stimson* (2), Baron *Pollock* said: "According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit."

These authorities appear to afford no certain light to answer the inquiry whether, in the absence of express stipulation, money paid as a deposit on the signing of a contract can be recovered by the payer if he has made such default in performance of his part as to have lost all right to performance by the other party to the contract or damages for his own non-performance.

Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

The practice of giving something to signify the conclusion of the contract, sometimes a sum of money, sometimes a ring or other object, to be repaid or redelivered on the completion of the contract, appears to be one of great antiquity and very general prevalence. It may not be unimportant to observe as evidence

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(1) 9 Ad. & E. 508.

(2) 11 Q. B. D. 142, 143.

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of this antiquity that our own word "earnest" has been supposed to flow from a Phœnician source through the *ἀῤῥαβὼν* of the Greeks, the *arra* or *arrha* of the Latins, and the *arrhes* of the French. It was familiar to the law of Rome, and without going into the distinctions of that law on the subject (see *Vinnius* on the Institutes (1), *Pothier*, *Contrat de Vente* (2)), it will be enough to observe that the general rule appears to have been that expressed in the Institutes iii. 24: "*Is qui recusat adimplere contractum siquidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur, licet super arrhis nihil expressum sit.*"

Furthermore the earnest did not lose that character because the same thing might also avail as part payment. "*Datur autem arrha vel simpliciter,*" says *Vinnius* (1), "*ut sit argumentum duntaxat et probatio emptionis contractae, veluti si annulus detur: vel ut simul postea cedat in partem pretii, data certa pecunia.*" From the Roman law the principles relating to the earnest appeared to have passed to the early jurisprudence of *England*. "*Item cum arrarum nomine,*" says *Bracton* (3), "*aliquid datum fuerit ante traditionem, si emptorem emptionis poenituerit et a contractu resilire voluerit perdat quod dedit: si autem venditorem, quod arrarum nomine receperit emptori restituat duplicatum.*" Though the liability of the vendor to return to the purchaser twice the amount of the deposit has long since departed from our law, the passage in question seems an authority for the proposition that the earnest is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things is apparent from the 17th section of the *Statute of Frauds*, which deals with them as separate acts, each of which is sufficient to give validity to a parol contract.

Taking these early authorities into consideration, I think we may conclude that the deposit in the present case is the earnest or *arrha* of our earlier writers; that the expression used in the present contract that the money is paid "as a deposit and in part payment of the purchase-money," relates to the two alternatives, and declares that in the event of the purchaser making default the money is to be forfeited, and that in the event of the purchase being completed the sum is to be taken in part payment.

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(1) Vinn. on Instit. iii. tit. 24.

(2) Part vi. c. 1, art. 3.

(3) Lib. ii. c. 27.

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Such being my view of the nature of the deposit, it appears to me to be clear that the purchaser has lost all right to recover it if he has lost both his right to specific performance in equity and his right to sue for damages for its non-performance at law. That the purchaser has by his delay lost all right to specific performance we have already decided. It remains to inquire whether he has also lost all right to sue for damages for its non-performance.

In my opinion the time fixed by a contract for the payment of the balance of the purchase-money and the completion of the contract was, according to law, as it stood before the *Judicature Act*, 1873, of the essence of the contract, so that non-payment on that day, provided it was not caused by the default of the vendor, authorized the vendor at law to treat the contract as rescinded. The cases of *Wilde* v. *Fort* (1), *Stowell* v. *Robinson* (2), *Noble* v. *Edwardes* (3), and the opinion of Lord *St. Leonards* on Vendor and Purchaser (4), are some amongst many authorities to which I might refer in support of these propositions.

The 25th section of the *Judicature Act*, 1873, enacted that stipulations in contracts as to time, which would not before the passing of the Act have been deemed to be of the essence of such contracts in a Court of Equity, should receive in all Courts the same construction and effect as they would theretofore have received in equity. The effect of this clause is, in my opinion, that the purchaser seeking damages is no longer obliged to prove his willingness and readiness to complete on the day named, but may still recover if he can prove such readiness and willingness within a reasonable time after the stipulated day; and the inquiry therefore arises whether the purchaser in the present case could aver and prove such readiness and willingness within a reasonable time.

The contract was entered into on the 24th of March—the 24th of April being fixed for completion—but by a letter written at the same time the vendor's solicitor agreed that the clause for resale should not be put in force till the lapse of six weeks from the 24th of April. This was not a stipulation postponing the time for completion generally, but merely limiting the exercise of a consequential power. The 24th of April arrived, and the draft conveyance had not been sent, and the vendor pressed for completion, but in vain. It appears that on the 20th of June the vendor agreed to give a month's time for completion on the purchaser agreeing to pay certain costs (to which the purchaser assented). Having regard to all that had occurred before, I consider that the expiration of this month was the latest time at which the purchaser could require the vendor to accept the purchase-money and complete. The month expired and no payment was made, and though this action was begun shortly after, I do not find that any tender of payment has ever been made. I conclude, therefore, that the purchaser could not shew a readiness and willingness to complete, either on the day fixed or within a reasonable time after; but I find on the contrary such a protracted default on the purchaser's part, notwithstanding the urgency of the vendor, as, in my opinion, justified the vendor in treating the purchaser as refusing to complete (notwithstanding his protestations of good intentions for the future), and as further justified the vendor in treating the contract as rescinded. In a word, the purchaser has, in my opinion, been guilty of such delay, whether measured by the rules of law or equity, as deprives him of his right to specific performance, and of his right to maintain an action for damages—and under these circumstances I hold that the purchaser has no right to recover his deposit.

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(1) 4 Taunt. 334.

(2) 3 Bing. N. C. 928.

(3) 5 Ch. D. 378.

(4) 13th Ed. chap. vi. sect. 1.

Yet another point has been raised and demands decision. The 8th clause of the agreement gives, as I have already stated, a power to the vendor to resell if the purchaser fail in his performance, and declares that the deficiency on such second sale shall be made good by the defaulting purchaser and be recoverable as liquidated damages. In the present case the Defendant, the vendor, declined to perform the contract on the ground of delay on the part of the Plaintiff, the Plaintiff brought this action, and about six months subsequently the vendor resold the property at the original price; and it is contended by the Plaintiff that the Defendant thereby lost all right of retaining the deposit. If the vendor had chosen to resell under this power and to sue the purchaser for the deficiency, he would, in my opinion, and in

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accordance with the case of *Ockenden* v. *Henly* (1), have been obliged to bring the deposit into account; but that is not the course which he has pursued. It appears to me that when the purchaser had failed on his part down to the last moment which law or equity gave to him, the vendor's title was absolute, both to the whole legal and equitable estate in the land sold, and also —by force of the terms of the deposit—to the deposited money, and that the purchaser could recover no right in this deposit because the vendor chose to sell his land as he was entitled to do under his title as absolute legal, and equitable owner. The observations of Lord *St. Leonards* on this subject (2) appear to me very cogent. Whether a clause such as the 8th in the present contract gives the vendor a power of resale for a default in performance on the very day named, it is not now necessary to inquire. But in my opinion there has been such default as justifies the vendor in treating the contract as rescinded; it affords the vendor an alternative remedy, so that he may either affirm the contract and sell under this clause or rescind the contract and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency: if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause in question.

For these reasons I conclude that the appeal must be dismissed, with costs.

Solicitor for Plaintiff: *C. C. Parr.*
Solicitor for Defendant: *W. White.*

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(1) E. B. & E. 485.

(2) V. & P. 13th Ed. p. 33.

M. W.

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In re WEST DEVON GREAT CONSOLS MINE.

Cost-book Mine—Stannaries Court—Winding-up Petition—Order for Inspection of Documents—18 & 19 *Vict. c.* 32, *s.* 22 [*Revised Ed. Statutes, vol. xii., p.* 446.]

The practice of the Stannaries Court is the same as that of the High Court of Justice, that the mere fact of a petition is not enough to justify an order for inspection of books. But if grounds are shewn, the petition may properly be ordered to stand over to allow the petitioner to enforce his right as a shareholder to inspection.

The right of inspection under the 22nd section of the *Stannaries Act*, 1855, is personal to the shareholder, and does not extend to his solicitors or agents.

THIS was an appeal from two orders of the Vice-Warden of the Stannaries Court.

The *West Devon Great Consols Mine* was a mine managed on the cost-book principle.

A petition was presented by *T. W. Mulloney*, one of the shareholders, praying for the winding-up of the company, on the ground that the mine was being worked at a loss, and that under all the circumstances it was just and equitable that it should be wound up.

The petition was opposed by the purser and several of the shareholders. It was supported by affidavits of the Petitioner and his solicitor, and the Petitioner put in evidence a letter from the purser, dated the 24th of November, 1883; he said, "As to what may be done at the mine it rests entirely with the shareholders, and they are against going on, at least the majority are of that opinion, and I think they are right." He also deposed to a conversation with the purser, in which the purser told him that the lodes which were worked became poorer and poorer and gradually narrower until they were not thicker than one's hand; that the mine was worthless, and that thousands of shares had been relinquished, and he advised the Petitioner to relinquish his shares if he desired to avoid any further loss.

When the petition came on to be heard on the 5th of March, 1884, the purser attended for cross-examination, but the Vice-

Warden made an order adjourning the hearing of the petition, in order, as was stated, that the Petitioner might have the opportunity of making an application for an inspection of the books of the company under the 22nd section of the *Stannaries Act*, 1855 (18 & 19 Vict. c. 32) (1).

The Petitioner accordingly made the application, which was heard at the same time with the petition, on the 25th of March, and the Vice-Warden then made an order that the purser should produce to the Petitioner, or his agent, the cost-books, share ledger, minute-book, and all other books and vouchers belonging to the mine; and that the hearing of the petition for winding up should be adjourned.

From these two orders of the 5th of March and the 25th of March the company appealed.

Northmore Lawrence, for the Appellants:—

The adjournment of the petition for the purpose of allowing inspection of the books of the company was contrary to the practice of the Court. The Court never permits inspection of documents to a petitioner in order to enable him to support a winding-up petition: *In re Emma Silver Mining Company* (2). It is said that the Petitioner being a shareholder had a right to inspect the books under the *Stannaries Act*, 1855, s. 22. But it was an abuse of that right to order an inspection for the purpose of wrecking the company. The purser was present at the hearing of the petition, and might have been cross-examined and called on to produce the books, and all the information to which the Petitioner was entitled might have been obtained without adjourning the petition.

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(1) 18 & 19 Vict. c. 32, s. 22, provides that "in all cases of like mines and partnerships it shall be lawful for the Vice-Warden, upon application of any adventurer or shareholder founded on sufficient grounds and affidavit, and although no suit be then pending, to make a rule or order for production of the cost-books of the mine, list of adventurers, and such other books and documents relating to the mine and management thereof as the Vice-Warden shall think proper, for inspection of such applicant, and to enforce such rule or order by attachment within the Stannaries, or by causing the same to be made a rule or order of one of the Superior Courts at Westminster under the statute in such case made and provided."

(2) Law Rep. 10 Ch. 194.

Grosvenor Woods, for the Petitioner:—

It is admitted that the Petitioner had a right to an order for inspection under the Act on shewing good grounds for his application before the Vice-Warden. The only question is whether the pendency of the petition for winding up suspended that right, and precluded the Vice-Warden from making the order. There is no authority for such a contention. The petition was not a mere wrecking petition; the letter and statements of the purser were sufficient in themselves to justify the application for inspection and the adjournment of the petition till the true condition of the company was known. The Vice-Warden had a discretion as to making the order which the Court will not interfere with: *In re Credit Company* (1).

Northmore Lawrence, in reply.

BAGGALLAY, L.J.:—

The petition for winding up in this case was presented in February, 1884, and was heard on the 5th of March, when the Vice-Warden made an order for adjourning the petition. The order was simply for adjournment, but it is stated that it was understood that the Petitioner would present a petition under the 22nd section of the *Stannaries Act*, 1855, for inspection of the books of the company, and that the petition was adjourned for that purpose. An application was accordingly made under that section, and the matter came on to be heard with the adjourned petition on the 25th of March, and then the Vice-Warden made an order for inspection, and ordered the petition again to be adjourned. An appeal is brought from both these orders.

The 22nd section of the *Stannaries Act*, 1855, under which the order for inspection was made is as follows:—[His Lordship read the section.] It is observable that the application must be made on sufficient ground on affidavit or otherwise. Therefore the Vice-Warden had a judicial discretion as to making or refusing the order. I was disposed at first to think that an error had been committed in adjourning the petition on the 5th of March, because at that time there was no petition pending for

(1) 11 Ch. D. 256.

inspection. But although there had been no petition presented, it appears that an affidavit had been put in, on which the subsequent application was made, and this affidavit was before the Vice-Warden, and there were also statements and a letter from the purser to the Petitioner with reference to the condition of the mine, putting it before him that on that account it was not desirable to proceed with the petition. In that state of circumstances the Vice-Warden considered that though there was no pending application for inspection there was material which would support one, and he therefore adjourned the petition that such an application might be made. Then on the 25th of March the application for inspection came before the Vice-Warden, and the order for inspection was made. It appears to me that it was a matter for the exercise of his judicial discretion, and that he has exercised his discretion in a way which cannot be complained of. There were a great many members who supported the petition, and there were *primâ facie* grounds for the petition. The order for inspection was not a mere roving order. The question of the condition of the company had been actually raised, and the Vice-Warden having exercised his discretion to make an order for inspection, I see no reason to differ from him. The appeal must be dismissed.

COTTON, L.J. :—

I am of the same opinion. There are two questions before us. First, whether the petition for winding up ought to have been ordered to stand over; secondly, whether the Vice-Warden was right in making the order for inspection. The second question depends on the 22nd section of the *Stannaries Act*, and we have to decide whether discovery ought to have been ordered under that section in aid of a winding-up petition. I do not encourage the idea that a petitioner for a winding-up order has a right to have discovery to support his case, to fish out, in fact, something that may help him. But here the question is, whether the power of ordering inspection under the 22nd section ought not to have been exercised because a winding-up petition was pending. It is clear from the section that the Vice-Warden must have sufficient grounds for making the order. The suggestion that the statements in the petition might be proved by the books would not be sufficient ground; but independently of that, there were in my opinion sufficient grounds. These were the letter and statements of the purser, and the Petitioner had a reasonable ground for asking for inspection to see if these statements and letter were well founded. I think, therefore, there were sufficient grounds for the order for inspection, and that, independently of the winding-up petition, the Vice-Warden had full jurisdiction to make it.

The next question is, was the power to make the order taken away by the pendency of the winding-up petition? If the Vice-Warden had thought that it was a mere wrecking petition to ruin a going concern there would have been good reason for refusing the application; but as the evidence shewed a *primâ facie* ground for presenting the petition, I do not think that the mere pendency of the petition was any reason for refusing the application. It is a most ordinary thing, if there is a possibility of a company going on, to let the petition for winding up stand over in order to ascertain what the condition of the company really is. In my opinion the order made by the Vice-Warden was right.

There is one point, however, to which I wish to allude. I think the order for inspection of the books should be expressed to be for the Petitioner himself, not for his solicitor or agent. I think the right of inspection is peculiar to the shareholder and does not extend to his solicitors or agents.

LINDLEY, L.J.:—

I am of the same opinion. I will add no more than this, that I hope it will not be understood that we think there is any difference between the practice in the Stannaries Court and in the High Court of Justice in cases of winding-up petitions. The fact that a petition for winding up has been presented is not sufficient ground for ordering inspection of the books of the company. In the present case there were sufficient grounds for the order independently of the winding-up petition.

Solicitors: *Kerly & Co.; A. S. Ramskill.*

M. W.

HOLGATE *v.* SHUTT.

[1883 H. 5164.]

C. A.
1884
June 18.

Practice—Account—Settled Account—Order for Account not directing that Settled Account shall not be disturbed.

By the rules of a benefit society it was provided that the accounts should be audited, and that after they had been audited and signed by the auditors, the secretary and treasurer should not be answerable for any mistakes, omissions, or errors that might afterwards be proved in them. An action for an account was commenced by two shareholders, on behalf of themselves and all other the shareholders, against the secretary. No pleadings were delivered, and on a motion for a receiver being made the Defendant submitted to an order for an account of all moneys and property of the society come to his hands, without any direction as to settled accounts. The Defendant carried in a complete account, and the Plaintiffs carried in a surcharge. The Defendant then set up certain accounts which had been audited under the rules, as vouching his account for the period over which they extended. The point was brought before the Judge, who was stated to have expressed his opinion that the audited accounts must be treated as conclusive. The Plaintiffs then applied for a direction that in taking the accounts the audited accounts might be disregarded, on the ground that as the order did not save the settled accounts, they could not be attended to. The application was refused, and the Plaintiffs appealed:—

Held, that the audited accounts ought not to be disregarded, and that the appeal must be dismissed; but the dismissal was prefaced by a statement of the opinion of the Court, that the Plaintiffs, in taking the accounts under the order, were at liberty to impeach the audited accounts for fraud.

THIS was an action by *Holgate* and others, on behalf of themselves and all other the members of the *No. 2 King's Arms Hotel Benefit Building Society*, other than the Defendant, against *Thomas Shutt*, who had been secretary of the society, for an account of all moneys of the society come to his hands.

The 7th of the rules of the society, certified in March, 1872, under 6 & 7 Will. 4, c. 32, after providing for the keeping of accounts by the secretary and vice-president, and directing that the secretary should report on the state of the accounts of the society as therein mentioned, proceeded as follows: "The books of the secretary, vice-president, and treasurer, shall be audited every twelve calendar months by auditors appointed by the society, and signed by such auditors, to denote their accuracy, in the secretary's book. That each auditor shall be remunerated for his trouble, the amount to be determined by the committee for the time being. After such auditing and signing the secretary and treasurer shall not be answerable for any mistakes, omissions, or errors that may be proved in such accounts [*sic*] hereinafter."

The action was commenced in November, 1883, and no pleadings were delivered. On the 14th of December a motion was made by the Plaintiffs that the Defendant might be ordered to pay into Court the sums of £358 1*s.* 6*d.* and £375, in his hands, as a trustee for the society, and that a receiver might be appointed of the rents and profits of the landed property of the society, and to get in the outstanding personal estate. The Defendant not opposing, an order was made that he should pay into Court the £358 1*s.* 6*d.*, which sum he admitted to be in his hands, and that a receiver should be appointed, and the following account was directed: "An account of all moneys and property of the said society come to the hands of the Defendant or to the hands of any other person or persons by his order or for his use."

The Defendant paid the £358 1*s.* 6*d* into Court, and carried in an account purporting to be an account of all his receipts and payments during the time that he had been secretary.

The Plaintiffs carried in a surcharge. The Defendant took the objection that the Plaintiffs could not raise any questions upon the account prior to the date of the last audit in October, 1881. This objection having been taken before the Chief Clerk, was brought before the Vice-Chancellor. No order was drawn up, but His Lordship was stated to have expressed his opinion that any account duly audited under rule 7 was conclusive. The Plaintiffs then took out a summons asking for an order that in taking the account directed by the order of the 14th of December, 1883, the audited accounts of the society referred to in rule 7 of the rules of the society might be disregarded.

The summons was heard by Vice-Chancellor *Bacon*, in Chambers, on the 22nd of April, 1884, and the application was refused. The Plaintiffs appealed.

The Plaintiffs gave evidence that on the 2nd of October, 1882, the Defendant had credited himself in the account with £125 as paid to one *J. W. Haworth*, when he had only in fact paid £25,

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and that he had altered the receipt by inserting the figure 1 before the 25, and that on the 1st of May, 1883, he had credited himself with £75 as paid to one *James Eatough*, which sum had not been paid at all.

The appeal was heard on the 18th of June, 1884.

Millar, Q.C., and *Farwell*, for the Plaintiffs:—

The Defendant never set up a settled account until the account came to be taken in Chambers. He then claimed to treat the audited accounts as conclusively verifying those parts of his general accounts over which they extended. We contend that if an order directs a general account without any directions that settled accounts are not to be disturbed, they cannot be regarded. *Daniell's* Chancery Practice (1); *Fitzpatrick* v. *Mahony* (2); *Seton* on Decrees (3). There is proof of fraudulent entries in the Defendant's accounts.

[COTTON, L.J.:—Can you open settled accounts on the ground of fraud subsequent to the settlement?]

Probably not; but if the settled accounts had been set up we should probably have been able to prove fraud in them.

Marten, Q.C., and *Hamilton Humphreys*, *contrà*:—

[BAGGALLAY, L.J.:—Do you contend that having had the accounts audited under rule 7 will protect you from accounting for sums which you fraudulently excluded?]

No; but we say that no case of fraud has been made out.

[They were stopped by the Court.]

BAGGALLAY, L.J.:—

This is an appeal from an order of the 22nd of April refusing an application that in taking the accounts directed by the order of the 14th of December, 1883, the audited accounts of the society referred to in rule 7 of the society's rules might be disregarded. I am of opinion that the Vice-Chancellor was right in refusing the application, but there is a matter behind to which we cannot shut our eyes. The Defendant was in the position of a trustee—he had held his office for some years before the commencement of this action, and questions having arisen as to his receipts and acts, this action was brought, in which an application was made to appoint a receiver; and, after hearing evidence, the order of the 14th of December, 1883, was made, being in substance an order made by consent. The 7th of the society's rules, after providing for auditing the accounts, proceeds to say that after the accounts are audited and signed, the secretary and treasurer shall not be answerable for any mistakes, omissions, or errors that may afterwards be proved to exist in them. Now that rule cannot prevail to protect a secretary or treasurer if the approval of the accounts is obtained by fraud. An account has been directed as between the members of the company and the secretary. In taking those accounts regard must be had to the rules of the society, and if audited accounts are brought forward they must be taken *primâ facie* as in the nature of receipts, and the burden lies on those who seek to disturb them. If there is any ground for impeaching any of them for fraud, it is open to the members of the society to impeach them in Chambers. This can be done under the order as it stands, and no express order is wanted for the purpose. But it appears that before making this order the Judge expressed an opinion that the audited accounts were to be treated as conclusive to all intents and purposes. At all events the parties were under the impression that His Lordship had come to this conclusion, and we ought to guard against that. Although, therefore, in my opinion the appeal must be dismissed, I think that our order ought to contain a recital to the effect that in taking the accounts it will be competent to the Plaintiffs to shew cause on any sufficient grounds why any particular audited account should not be held binding.

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(1) 6th Ed. p. 1060.

(2) 1 J. & Lat. 84.

(3) 4th Ed. p. 794.

COTTON, L.J.:—

I also am of opinion that the course proposed by Lord Justice *Baggallay* is the proper one. In my opinion the summons is wrong in form, for it would not be right to lay down that duly audited accounts are to be disregarded. The question does not appear to me to be, properly speaking, a question as to settled accounts, but as to the amount of protection afforded to an officer of the company by rule 7. I think that the rule is no protection against inaccuracies in the accounts arising from fraud; it deals only with cases of accidental mistake, but it gives protection against errors of that description. I am of opinion, therefore, that the summons was properly dismissed, but I think that our order dismissing the appeal ought to be, "the Court being of opinion that accounts duly audited and signed under rule 7 are *primâ facie* evidence in the Defendant's favour, but that the Plaintiffs are entitled to impeach them for fraud, if a case can be made for so doing, dismiss the appeal."

LINDLEY, L.J.:—

I also am of opinion that the proposed form of order is right. In considering this case we must have regard to the recent alterations in pleading and procedure. We must take care not to introduce rules which would preclude parties from impeaching a settled account on the ground of fraud, and at the same time we must not treat settled accounts as waste paper. It would, I think, be very unfair to make an order in the terms of this summons, and it would be equally unfair to hold that the Plaintiffs are precluded from impeaching in Chambers the audited accounts on the ground of fraud.

The order as drawn up was as follows:—

"This Court being of opinion that though accounts audited and signed in accordance with rule 7 of the rules of the society are *primâ facie* evidence in favour of the Defendant, it is competent for the Plaintiffs in taking the accounts directed by the order of the 14th of December, 1883, to impeach such accounts for fraud, this Court doth not think fit to make any order on the said appeal but [order for Plaintiffs to pay costs of appeal.]

Solicitors for Plaintiffs: *Pritchard, Englefield, & Co.*
Solicitors for Defendant: *Johnson & Weatheralls.*

H. C. J.

C. A.

1884

June 21.

In re SCOTT.

Alleged Lunatic—Order for Inquiry before Judge of the High Court—Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *s.* 4 [*Revised Ed. Statutes, vol. xiv., p.* 189.]—8 & 9 *Vict. c.* 109, *s.* 19 [*Revised Ed. Statutes, vol. ix., p.* 997].

When an issue is directed by an order in Lunacy to try the question of the insanity of an alleged lunatic before a Judge of the High Court of Justice under the *Lunacy Regulation Act,* 1862, s. 4, it is not necessary to commence the proceedings by a writ of summons, the order for the issue being sufficient to give jurisdiction to the Judge.

ON the 4th of February, 1884, an order was made in Lunacy that a Master in Lunacy should inquire before a jury concerning the alleged lunacy of Mr. *George Gilbert Scott.* The Petitioner was a brother of the alleged lunatic.

On the 29th of March, 1884, Lord Justice *Bowen* made an order by which, after reciting that it had been represented to him that the aforesaid inquiry should be made under an issue to be tried in the High Court of Justice by one of the Judges in the Queen's Bench Division of the said Court, His Lordship ordered as follows: "Now I do order that all future proceedings under the said order of the 4th of February, 1884, so far as it directs the inquiry to be held by one of the Masters in Lunacy, be stayed. And I do order that the inquiry concerning the alleged lunacy of the said *G. G. Scott* shall be had and made before a good jury; and do, pursuant to the provisions of the *Lunacy Regulation Act,* 1862, order and direct that such inquiry be made under an issue to be tried in Her Majesty's High Court of Justice, in the Queen's Bench Division of the said Court; and that the question in such issue shall be whether the said *G. G. Scott* is a person of unsound mind and incapable of managing himself or his affairs." A jury was accordingly summoned before Mr. Justice *Denman* to try the said issue. The inquiry was held in *Lincoln's Inn Hall,* and lasted for several days, and concluded on the 9th of April, 1884, when a verdict was returned that Mr. *Scott* was of unsound mind and incapable of managing himself or his affairs.

An application was now made on behalf of Mr. *Scott* to the Lords Justices of Appeal sitting in Lunacy, for a declaration that the inquiry before Mr. Justice *Denman* and the certificate of the finding of the jury were irregular and void, and that some order might be made with a view of determining the subject of the petition.

Sir *H. Giffard*, Q.C., and *Bucknill* (*E. Beaumont* with them), in support of the application:—

The order was made under sect. 4 of the *Lunacy Regulation Act*, 1862 (1). But that section provides that the proceedings shall be regulated by 8 & 9 Vict. c. 109, and by the 19th section of that Act, by which the old proceedings under feigned issues were abolished, it was enacted that, "in every case where any Court of law or equity may desire to have any question of fact decided by a jury it shall be lawful for such Court to direct a writ of summons to be sued out, by such person or persons as such Court shall think ought to be plaintiff or plaintiffs, against such person or persons as such Court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this Act annexed." Therefore a writ ought to have been issued, and under that writ the issue ought to have been directed. Unless the provisions of the Act were strictly adhered to, Mr. Justice *Denman* had no authority to hold the inquiry or even to administer an oath. Under the old practice when an issue was directed by the Court of Chancery to be tried in a Common Law Court, there was a suit pending; but here there is no action pending in any Court. This appears to be the first case in which such an issue has been directed, and it is important that the practice should be correctly ascertained. By sect. 7 of the *Lunacy Regulation Act*, 1862, the alleged lunatic has no right of traverse of the finding as he formerly had, but must apply for a new trial, the granting or withholding of which is in the discretion of the Lord Chancellor. That shews that it was intended to assimilate the practice to that of an issue in an ordinary action.

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(1) 25 & 26 Vict. c. 86, s. 4: "Wherever under the said Act [the *Lunacy Regulation Act*, 1853,] the Lord Chancellor intrusted as aforesaid shall order an inquiry before a jury, he may by his order direct an issue to be tried in one of Her Majesty's superior Courts of Common Law at *Westminster*, and the question in such issue shall be, whether the alleged insane person is of unsound mind and incapable of managing himself or his affairs; and the provisions of the said Act with respect to commissions of lunacy, and orders for inquiry to be tried by a jury, and the trial thereof, and the constitution of the jury, shall apply to any issue to be directed as aforesaid and the trial thereof, and subject thereto such issue and the trial thereof shall be regulated by the Act of 8 & 9 Vict. c. 109, intituled *An Act to amend the Law concerning Games and Wagers*, and the verdict upon any such issue, finding the alleged insane person to be of unsound mind and incapable of managing himself or his affairs, shall have the same force to all intents and purposes as an inquisition under a commission of lunacy, finding a person to be of unsound mind and incapable of managing himself or his affairs, returned into the Court of Chancery."

Murphy, Q.C., and *Swinfen Eady*, for the Respondent, were not called on.

Baggallay, L.J.:—

The question raised in this application is whether the provisions of the 4th section of the *Lunacy Regulation Act*, 1862, have been complied with in the case of an inquiry under that section as to the state of mind of Mr. *Gilbert Scott*. Reliance was mainly placed on the words in the 4th section, "and subject thereto such issue, and the trial thereof shall be regulated by the Act of 8 & 9 Vict. c. 109, intituled *An Act to amend the Law concerning Games and Wagers*," by sect. 19 of which Act proceedings under feigned issues were abolished, and it was enacted that "in every case where any Court of Law or Equity may desire to have any question of fact decided by a jury it shall be lawful for such Court to direct a writ of summons to be sued out, by such person or persons as such Court shall think ought to be plaintiff or plaintiffs, against such person or persons as such Court shall think ought to be defendant or defendants therein, in the form set forth in the second schedule to this Act annexed." That is to say, that in any case in which a Court of Law or Equity directed an issue it was to direct who were to be plaintiffs and who defendants in the proceedings, and what was to be the form of issue which was to be tried. But the Lord Justices sitting in Lunacy are not a Court either of Law or Equity, and yet it is desirable for us to have the question of fact inquired into before a jury, whether a person is or is not of unsound mind. This we can do in either of two ways, either before the Master, with or without a jury, or before a Judge of the High Court with a jury.

The simple question to be decided is the soundness or unsoundness of mind of the alleged lunatic; there is no occasion to decide who is to be plaintiff or defendant in such issue. Before the Act of 1862 the inquiry was always before one of the Masters in Lunacy, but it was thought necessary to make an alteration. It is singular that this provision has never been acted on before 1884, so that the necessity for the alteration does not seem so clear as was then thought. In the present case, however, Lord Justice *Bowen* thought it desirable to direct an inquiry before a Judge of the High Court under the 4th section. That section is as follows:—[His Lordship read the section.] Having regard to the language of that section, I am of opinion that it is no longer necessary that a writ of summons should be issued for the purpose of shewing what the issue to be tried is, or who is to be the plaintiff or defendant. Then it was provided by the same section that the provisions of the *Lunacy Regulation Act*, 1853, that is the 38th and subsequent sections, should apply to any issue to be directed and the trial thereof, and that "subject thereto such issue and the trial thereof" should be regulated by 8 & 9 Vict. c. 109; that is to say, a certain mode of procedure having been adopted which brought the matter down to the time of trial, it is then taken up by 8 & 9 Vict. c. 109. It appears to me, therefore, that no writ of summons is necessary, as the issue is defined, and everything for which a writ is required is already provided for by the 4th section, and that this application is entirely without foundation.

What possible advantage could follow from the issue of a writ? It would be a mere additional form without any benefit to any one. Under the 7th section of the Act an application can be made to the Lord Chancellor or Lords Justices sitting in Lunacy for a new trial if the alleged lunatic desires it, but the present application must be refused.

COTTON, L.J.:—

I am of the same opinion. Undoubtedly the question raised in this application is a very important one, namely, whether the whole foundation of the present proceedings is a nullity. It is said that the order made by Lord Justice *Bowen* for the trial of an issue as to the insanity before a Judge of the High Court was a nullity because no writ was issued. But the question is whether the 4th section of the Act of 1862 does not direct that the order should of itself give jurisdiction to the Judge to try the issue. If we take the first part of the section I hardly think there can be any doubt about it. In my opinion, construing the section fairly and reasonably, when it says that the Lord Chancellor may by his order direct an issue to be tried before a Judge, that gives the Judge acting under the order jurisdiction and authority to try the issue, and to do all things necessary, to swear the jury and witnesses, and, in my opinion, if that stood alone the Judge would have all powers necessary to make that effectual which the statute had authorized to be done. Then the section, after referring to the provisions of the *Lunacy Regulation Act*, 1853, goes on to say that subject thereto such issue and the trial thereof shall be regulated by the 8 & 9 Vict. c. 109, and those are the words which have caused the difficulty. It is said that it imports into the section all the provisions of sect. 19 of the 8 & 9 Vict. c. 109, and renders it necessary to issue a writ of summons as a commencement of the proceedings. In my opinion that is an erroneous contention. It arises from an erroneous view of the nature of the proceedings in Lunacy. They are not taken adversely between litigants, but under special authority from the Crown given to the Lord Chancellor and the other persons designated under the sign manual to act for the care and custody of lunatics. It is not intended that these powers, which are only given to enable the Crown to ascertain whether the alleged lunatic is insane, should be exercised by the Lord Chancellor or Lord Justices as Judges of the Court of Appeal, deciding between adverse litigants. If it had been intended that a writ should be issued there would have been a direction to that effect in the section; but there is nothing of the kind.

It was said that there is no right of traverse reserved to the lunatic when the issue is tried before a Judge of the High Court, but a special application must be made to the Lord Chancellor for a new trial, and it is argued that this shews that it is intended to assimilate the practice to that in an ordinary action. In my opinion there is no such intention implied. When there was an ordinary inquiry directed before the Master the alleged lunatic was entitled as of right to a traverse. He was strictly no party to that inquiry, and therefore it was right that he should have power to traverse it. But in this case, where he is a party to the proceedings, there is no necessity for such right; it is sufficient protection to the alleged lunatic that the Lord Chancellor or Lords Justices acting in Lunacy should have a discretion to grant a new trial. They have a full discretion to decide what they think best to be done under the circumstances of each case.

I am of opinion that Mr. Justice *Denman* had full jurisdiction to try the question in this issue, and there is no ground for setting aside the proceedings.

Lindley, L.J.:—

I cannot see any difficulty in this case. The question turns upon the construction of the 4th section of the *Lunacy Regulation Act*, 1862. What is the Lord Chancellor empowered to do? He is to make an order directing an issue to be tried by a Judge of the High Court. The issue is stated by the Court in the order. In the 8 & 9 Vict. c. 109, the enactment is that a writ shall issue; here it is that the Lord Chancellor shall direct an issue. Then the section in question says that the issue and the trial thereof shall be regulated by the 8 & 9 Vict. c. 109. That does not refer to the machinery for arriving at the issue, but for the trial of the issue when you have got it. I agree that this application fails.

Solicitors for Mr. *Scott*: *Hall, Knight, & Co.*

Solicitors for Respondent: *Parker, Garrett, & Parker.*

M. W.

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1884
June 24, 26.

KENSIT *v.* GREAT EASTERN RAILWAY COMPANY.

[1881 K. 1050.]

Riparian Owner—Abstraction of Water by non-riparian Owner—Absence of Damage—Right of Action—Injunction—Rights of riparian Owner in artificial Stream.

The owner of land not abutting on a river with the license of a riparian owner took water from the river, and after using it for cooling certain apparatus returned it to the river unpolluted and undiminished:—

Held (affirming the decision of *Pollock*, B.), that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken.

Observations on the rights which can be acquired by a riparian owner in an artificial stream.

THIS was an appeal from a judgment of Mr. Baron *Pollock*, sitting for Mr. Justice *Pearson* (1).

The Plaintiff, *J. G. Kensit*, was the owner of land at *Mistley*, near *Manningtree*, in *Essex*, and the Plaintiff, *C. F. Norman*, was his tenant. A stream of water had always flowed through this land. In 1856 the *Great Eastern Railway Company* bought some land of Mr. *Kensit*, thereby intersecting his land. On the land so bought the company built their railway with a culvert through which the stream flowed. In August, 1881, *Robert Free*, who had land adjoining that of the railway company, but not abutting on the stream, under a license or grant from the railway put two pipes through the land of the company. By one of these pipes he drew into a tank and pumped up water which he used for cooling or condensing purposes connected with his business as a saccharine manufacturer, and he then discharged it back into the stream a few feet lower down by the other pipe. In the agreement between *Free* and the company there was no limitation as to the amount of water which *Free* might draw from the stream.

The Plaintiffs, as owners of land abutting on the stream below, brought this action to restrain the railway company and Mr. *Free* from so using the water. In the statement of claim they alleged that the water was returned into the stream in diminished quantity and in a polluted state. This was denied by the Defendants in the statement of defence; and at the hearing it was admitted that the water was returned to the stream uninjured and undiminished.

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(1) 23 Ch. D. 566.

Mr. Baron *Pollock* held that the Plaintiffs had no cause of action, and gave judgment for the Defendants. From this judgment the Plaintiffs appealed.

Barber, Q.C., and *C. E. Jones*, for the Plaintiffs:—

A riparian proprietor can only use the water for his own purposes, and in a reasonable manner, but he cannot make a grant of it to a person who is not a riparian proprietor: *Stockport Waterworks Company* v. *Potter* (1); *Nuttall* v. *Bracewell* (2); *Ormerod* v. *Todmorden Joint Stock Mill Company* (3). It is not necessary to prove actual damage; there has been a violation of a legal right, and moreover a railway company has only a right to use the water for the purposes of their undertaking: *Wilts and Berks Canal Navigation Company* v. *Swindon Waterworks Company* (4). Although there is no present damage there is the prospect of future damage. For if *Free* were to enjoy this right of using the water for twenty years he might get a prescriptive right to use it. He would gain the position of a riparian proprietor as regards the artificial watercourse, which is in itself an injury to us: *Bickett* v. *Morris* (5); *Elmhirst* v. *Spencer* (6); *Embrey* v. *Owen* (7); *Goddard* on Easements (8).

[Cotton, L.J., referred to *Earl of Norbury* v. *Kitchin* (9).]

Philbrick, Q.C., and *Smart*, for the Defendants:—

The Plaintiffs have received no damage, nor can they shew that they are likely to receive any. If the user of the water were an infringement of a legal right of the Plaintiffs which

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(1) 3 H. & C. 300.
(2) Law Rep. 2 Ex. 1.
(3) 11 Q. B. D. 155.
(4) Law Rep. 9 Ch. 451
(5) Law Rep. 1 H. L., Sc. 47.
(6) 2 Mac. & G. 45.
(7) 6 Ex. 353.
(8) Page 334.
(9) 15 L. T. (N.S.) 501.

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might grow by lapse of time into an adverse right, the Plaintiffs might have a right of action. But here there is no possibility of the use by Mr. *Free* growing into a right. It is admitted that the water is returned into the stream uninjured and undiminished. Therefore the Plaintiffs get all that they are entitled to. If at any time Mr. *Free* were to pollute or diminish the water a right of action would accrue, and the Plaintiffs would have to take care that the infringement did not grow into a right; but until there is some injury the time for prescription will not run. There is no case in which a riparian owner has maintained an action for abstraction of water where no damage is proved except against a fellow owner. If an owner can bring an action to restrain user of the water by a stranger without proving damage, it might be brought as well by an owner above the place where the water is taken as below, which would be a manifest absurdity: *Orr Ewing* v. *Colquhoun* (1); *Williams* v. *Morland* (2); *Embrey* v. *Owen* (3); *Miner* v. *Gilmour* (4); *Nuttall* v. *Bracewell* (5); *Pennington* v. *Brinsop Hall Coal Company* (6).

Barber, in reply.

BAGGALLAY, L.J.:—

This is an appeal from a judgment given by Mr. Baron *Pollock*, sitting for Mr. Justice *Pearson*, in favour of the Defendants in the action. The action was brought under circumstances to which I am about to refer. It is a very inconvenient circumstance in this case that, for some reason or other, the particular view of the case, as put forward by the Plaintiffs in their statement of claim, they seek not in any way whatever to substantiate upon the hearing of the action, but rely entirely on certain other views.

It appears that the railway company, crossing a small brook in the county of *Essex*, covered in, or inclosed, if I may use the expression, in a culvert, that portion of the stream which passed under their railway. They had taken the land upon which the railway was constructed from a gentleman of the name of *Kensit*,

(1) 2 App. Cas. 839.
(2) 2 B. & C. 910.
(3) 6 Ex. 353.
(4) 12 Moo. P. C. 131.
(5) Law Rep. 2 Ex. 1.
(6) 5 Ch. D. 769.

the first-named of the Plaintiffs, and he had land lower down the stream than the portion of the stream where it passed through the railway company's land. The railway company entered into an agreement with a gentleman of the name of *Free*, by virtue of which, according to the terms of the agreement, water could be diverted, by aid of a three-inch pipe, leading from the culvert where the stream passed under the railway company's land in a direction substantially perpendicular to the course of the stream, to the premises of Mr. *Free*, who had no portion of his land abutting upon the stream; he was not a riparian owner in any sense of the word. The agreement in effect enabled him for a trifling consideration to draw water from the stream by means of the three-inch pipe so let into the culvert; it contained no restrictions whatever upon Mr. *Free* as regards the mode in which he was to use the water which he was so allowed to abstract. So far as it was an agreement between the company on the one hand and Mr. *Free* on the other hand, he was at perfect liberty to do whatever he pleased with the water which was so abstracted. The Plaintiff *Norman* is the tenant of the Plaintiff *Kensit*.

The action was commenced in the month of October, 1881, and, by the statement of claim, after referring to the pipe as being inserted into the culvert so that the water was conveyed to Mr. *Free's* land, it was alleged, in paragraphs 6 and 7, as follows: "The said pipe still continues inserted in the said culvert, and ever since the month of August the Defendants have continued to obstruct the said watercourse and by means of the said pipe to divert and abstract large quantities of water from the said watercourse. In and about and ever since the said month of August the Defendants have polluted and disturbed the water of the said watercourse by throwing and causing to flow into the same large quantities of noxious substances and fluids and heated water. In consequence of the premises the water in the said watercourse has ceased to flow through the Plaintiffs' land and into the Plaintiffs' lake in its natural state as heretofore, and become diminished in quantity and polluted in quality and unfit for the purposes for which before the acts complained of it had been used by the Plaintiffs, and the Plaintiffs' land has become deteriorated in value." Those are the circumstances

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stated in their statement of claim, and upon which the Plaintiffs came to the Court and asked for relief. What they asked for was, "An injunction to restrain the Defendants from obstructing the said watercourse, or polluting, diverting, diminishing, abstracting, or interfering with the water therein, or in any way using the same so as to injure the Plaintiffs in their property or their rights thereto." A statement of defence was put in, in which the Defendants stated, "By an agreement with the Defendant railway company, the Defendant *Free* possesses the right to take water from the said watercourse at a point within the lands belonging to the Defendant company, and which point is herein referred to as the point of withdrawal, the object for which the said right was granted was that the water so drawn should, as hereinafter mentioned, be employed in the saccharine factory recently erected by the Defendant *Free* near the said watercourse. This factory of the Defendant *Free* was constructed in the month of August, 1881." Then the company allege an agreement with Mr. *Free*, by virtue of which Mr. *Free* had the right to take the water from the brook by means of this pipe and convey it to his own premises to be employed in his saccharine factory recently erected there. However they go on to say in paragraph 6, "The Defendant *Free* draws the said water into a tank or filter bed erected on the bank of the said watercourse, and from that tank the water is pumped through a three-inch cast-iron suction pipe into the said Defendants' factory. The water so drawn is used by the said Defendant for condensing only, and is then returned to the said watercourse at a point some six feet below the point of withdrawal and within the land of the Defendant company. The water so returned is not diminished in quantity, nor is it in any way fouled or polluted, or rendered less fit for any of the uses to which riparian proprietors lower down the said watercourse can or are entitled to put the same."

That is the statement of the case made by the Defendants in answer to the Plaintiffs' claim. There they recognise fully the fact that the water is abstracted; they detail the mode in which the abstraction is made, namely, first of all drawing it into a tank on the company's premises, and from that Mr. *Free* pumps the water which he uses. As I understand it, Mr. *Free* requires and uses the water for condensing purposes only; I suppose it passes round the vessel which contains the hot matter in the saccharine manufacture, travels on, and comes back to the stream at a point only six feet from the point where it was withdrawn. If that is the fact, it is very difficult to see what injury the Plaintiffs can possibly have sustained. The water is drawn up, it performs a little circuit, comes back again, and then goes into the stream only six feet from the point where it was abstracted. That is the allegation of the Defendants, and it was accepted by the Plaintiffs when the action came into Court.

Then we have this very singular state of circumstances. In the pleadings there is a direct conflict, the allegation in the statement of claim being abstraction of water and pollution of what is returned, and a defence, in the strongest possible terms, that there is no abstraction whatever, and no pollution or injury whatever.

But, when the parties come into Court, it was admitted that there was neither abstraction, pollution, nor injury; I gather this from the statement of the reporter, and also from the judgment of Mr. Baron *Pollock;* the statement in the report says that: "In the course of the hearing it was admitted that the water was returned to the stream uninjured and undiminished," and Mr. Baron *Pollock* said (1): "It was admitted by the Plaintiffs that it was returned, in such a manner that with regard to the rights of the Plaintiffs both above and below they had since the acts complained of, had the benefit of the flow of water both with regard to the quantity and absence of pollution in the same manner as they had had heretofore." It was said on the part of the Defendants: "There was no occasion for us to enter into any evidence because all that we had alleged in our statement of defence is admitted by the Plaintiffs, namely, that although the water was taken away, it was sent back again undiminished in quantity and unaffected in quality." I can hardly imagine a case coming in that form before the Court more completely leading up to a judgment in favour of the Defendants—a case put forward which if it had been true would have most certainly entitled them to the injunction which they asked, but which upon their own

(1) 23 Ch. D. 569.

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admission upon the hearing of the action was given up, and admissions made quite to the contrary of the allegation.

The way in which I look at the case is this. I leave out of consideration for the moment the fact of there having been any agreement between the two Defendants; I find that the Plaintiffs come into Court alleging that certain acts have been done which, if they had been done as alleged by them, would have led to very substantial injury, but that at the hearing the whole case, as alleged by them in their statement of claim, is entirely displaced. That is, in my opinion, quite sufficient to support the decision at which the learned Judge arrived, to give judgment for the Defendants.

But then it is said that if you look further than that, and, if you have regard to the real agreement entered into between the two Defendants, it amounted to a right conferred, if such a right could be conferred by the company, upon Mr. *Free*, to abstract all the water which a three-inch pipe would convey and allow Mr. *Free* to use it for any purpose he pleased, for the agreement contained no provision whatever as to how it was to be used. That is the way in which it was put. Well that may have been a grant of such rights as the company, as riparian owners, were not justified in granting. But is that a matter for the Court to take into consideration upon an inquiry of this kind? If you look into the facts of the case, as, in the absence of evidence, they are admitted by the parties, you have a state of things which possibly if it led to injury would have given the Plaintiffs a right to complain, but which in fact leads to no present damage or injury to them whatever.

Now I fully admit that if it appeared that, although there was no immediate injury sustained, there might be an injury derived by a continuance of the course which the Defendants are adopting, then, according to the view which I at present hold, there would be a case entitling the Plaintiffs to an injunction. There might be a question, which I do not think it worth while now to enter into, upon which of the two parties the burden would lie to shew whether there might be or might not be a future injury if the same user were continued; according to some of the decisions, it would be for the party who has done that which might lead to injury, and which if it did lead to injury would entitle the other party to an injunction, to prove that it could not in any event lead to that. But without considering upon whom the burden of proof would lie, it appears to me beyond all question that so long as the present user of the pipe which has been inserted into the culvert, and by which the Defendant *Free's* premises are supplied, is concerned, it is impossible that there should be any injury of which the Plaintiffs would be entitled to complain.

It was suggested in the course of the argument, and at one time I thought that there was some force in the suggestion, that by this diversion of the stream there might be certain riparian rights acquired by Mr. *Free* if the present state of things was allowed to go on for a period of twenty years. But according to the best opinion I can form on the case it appears to me to be impossible, so long as he continues to return to the river the whole of the water he takes out, and that in an unpolluted form, that there can be any injury to the Plaintiffs from his doing so. If at any future time he changes his course of action, and either reduces the quantity of water abstracted or pollutes that which he returns into the stream, then, no doubt, from the point of view which I take, a right of action would arise, but it would arise only when that act was done, and no continuance for twenty years or any other period of the present user would in any way prejudice the Plaintiffs in respect of the rights they would have at any time if any such future interference of this right was carried out. Therefore for those reasons it appears to me that the Plaintiffs have come into Court alleging a case which they utterly fail to support, and which by their own admissions is entirely contrary to the real facts of the case. I think Baron *Pollock* was perfectly right in the judgment which he pronounced, and that the appeal should be dismissed with costs.

COTTON, L.J.:—

I do not in any way differ from what has been said by Lord Justice *Baggallay* as to the position of plaintiffs who have come into Court making the case which here the Plaintiffs did, and who have entirely failed to support the allegations on which they

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came into Court. But I would rather dispose of this case on the substantial question which has been argued before us, and it is this: The Plaintiffs, who are lower riparian owners, complain of the action of the Defendants, and they do so with this admission (having brought no evidence to support the case they originally made), that although there is a diversion of the water to the works of the Defendant *Free*, yet the water which is so diverted is not at all diminished in quantity or damaged in quality, but is restored before the stream comes down to the Plaintiffs' land.

I may mention here that it occurred to me at one time that there must be an intermittent action in the stream in consequence of what was done by the Defendants, and possibly there was when this pipe was originally opened; but I think one ought not, in the absence of any evidence, to infer that there is now any intermission in the flow of the stream caused by what has been done by the Defendants, or, simply because that was once caused some time ago, to grant an injunction.

The Plaintiffs say, and they are right, that a riparian owner is in this position, that he can maintain an action for interference with his right, even although he does not shew that at the time he has suffered any actual damage and loss. But then we must consider what the right of a riparian owner is as regards the lower riparian owners. It is this, that he has a right to take and use the water as it runs past him for all reasonable purposes. I need not go further into what are reasonable purposes. Then, as against the upper proprietors, he has this right, he is entitled to have the flow of the water in the natural bed of the river coming down to him unaltered in quality and quantity, subject only to the right of the upper proprietors, such as he has against the proprietors below him, to take the water for reasonable purposes. Then he has this right, that where the stream comes opposite to or through his land it shall come in its ordinary and accustomed channel.

Now has that been interfered with? I am of opinion it has not. The quantity and quality of the stream when it comes into the Plaintiffs' land is the same as it always was.

Then it is said that there has been a diversion here, and therefore it does not come in its accustomed channel. Well,

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undoubtedly there has been a diversion of a certain portion of the stream, and one must consider that it might extend to the whole of it. What is to be understood by "coming in its accustomed channel?" In the quotation from *Kent's* Commentaries, cited in *Sampson* v. *Hoddinott* (1), it is said: "Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate," that is to say, that the lower riparian proprietor, as against the upper riparian proprietor, has a right to say, "You shall not so deal with the water that when it comes into my land it is not in its customary channel in my land."

Then it is said that *Bickett* v. *Morris* (2) establishes this proposition, that when there is any interference with the bed of the river, this, although not causing any injury to an opposite owner or to the lower riparian owners, is ground of action. That, I think, was not the real meaning of *Bickett* v. *Morris*. Lord *Westbury* disposed of that proposition by suggesting that if that were so the building of a boat-house on a stream would give a right of action to all lower riparian owners. What was decided was that what interferes with the channel of the river was a matter which would be actionable unless the Court were satisfied that there would not be any injury resulting from it either then or at a future time; and in such a case as the flow of water, which is so difficult to deal with, it would be a difficult case to determine whether what had been done would or would not produce any injury. If there was a reasonable prospect that it would produce any damage to the opposite or lower riparian owners, then that would give a right of action, although no actual injury was shewn to have resulted from it.

Here therefore if the water, although diverted in the upper riparian owner's property, was reintroduced, but reintroduced in such a way as that probably injury might be caused to the lower riparian owner, or that the entrance of the water to his land might be so altered that injury might be caused to him, that would be a diversion which, although taking place only in an upper riparian proprietor's property, might be actionable as one which would probably interfere with the accustomed flow, and therefore with the rights of the lower riparian owner. But here I do not see that there is any contention that this diversion and re-introduction, putting aside the temporary interference with the flow which must have existed at the first, can in any way produce any injury or loss to the Plaintiffs.

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(1) 1 C. B. (N.S.) 590, 605.

(2) Law Rep. 1 H. L., Sc. 47.

Earl of Norbury v. *Kitchin* (1) is a case to which I called attention, and at first sight it seems to support the view of the Appellants. There Vice-Chancellor *Wood* referred to the case of *Bickett* v. *Morris* (2) and said, having regard to that case, although no loss was shewn to be sustained by the plaintiff, he must grant the injunction. There the case had been tried at law and on two questions, the diversion of the stream to an artificial pond of the defendant and the damming of the river, the jury had granted a verdict for the plaintiff with one farthing damages; that is to say, their finding was this, that no actual loss had been sustained by the plaintiff but that his right had been interfered with, and on that footing Vice-Chancellor *Wood* decided that he was entitled to an injunction, because, although no actual loss was shewn to have been sustained by him, yet his right was shewn to have been interfered with, and his right being interfered with there was such a possibility of future loss as entitled him to an injunction. Therefore that does not support the contention here of the Plaintiffs.

Then it was said that the license or grant, as it was called, which had been made was wrongful, and that that gave a right of action against the railway company and against *Free* who accepted it. I think there was a mistake in the use of that word "wrongful" if it meant that it gave a right of action that might sustain the Plaintiffs' case. It is not wrongful in the sense of giving anyone a right to bring an action. It is wrong in this sense, that it is *ultrà vires*, and it is not effectual to put the Defendant *Free* in the position of having the same rights which he would have as a riparian owner.

It was said that the attempt to put another person in the position of a riparian proprietor was a wrong in respect of which the Plaintiffs are entitled to maintain an action, on the ground that the riparian proprietors are a body who cannot be added to except by acquisition of a portion of the bank of the river, and an attempt to do it in any other way was therefore wrongful. No case was cited to support that proposition, and in my opinion it cannot be contended that a right of action lies as against a man who attempts to do that which by law he cannot do, unless under that attempt something is done which interferes with the right of the Plaintiffs. Undoubtedly *Free* has not the rights of a riparian proprietor, which to some extent do interfere with the enjoyment of the lower riparian proprietors. But he is not exercising such rights. If he was attempting to do so his doing so would give a right of action, but the mere fact that he has accepted the grant, if it purports to give him that which he cannot have, in my opinion would not give as against him or the grantor a right of action to the lower riparian owner.

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(1) 15 L. T. (N.S.) 501.

(2) Law Rep. 1 H. L., Sc. 47.

Then there was this argument on the part of the Plaintiffs, that although what the Defendant *Free* is doing does not now produce any loss to them, he may by the supply he has acquired be put in a position to deprive them of that water which he is not now depriving them of. Of course so far as that depends upon user the right will only begin to be acquired from the time when he begins to use the water in derogation of the rights of the Plaintiffs as riparian owners. Then the right of action would arise. He does not do so now. He is using the water in such a way as not to interfere with the flow or the quantity or quality. But the argument comes to this, that by the existence for a number of years—it is not necessary to say what number of years—in this channel of this pipe by means of which the water is diverted from the river, *Free* might by being on the banks of that cut acquire the rights of a riparian proprietor. But the natural rights of a riparian proprietor as such are rights not of user but rights incidental to the ownership of property. In my opinion it is impossible to say that in this case *Free* by living on the banks of this pipe could ever acquire such rights. It is unnecessary, in my opinion, to say whether there could be any such artificial cut as could ever so far become part of the natural stream of the river as to give the owners on the banks of it the rights of riparian proprietors, that is, rights not from user but from the ownership of the land. It seems to me to be a contradiction in terms to say that any natural rights can ever be acquired in an artificial cut. Possibly after a length of time it might be difficult in some cases to say that a cut was not part of the natural stream, but I think it is impossible to suppose that after any lapse of time the channel in question could ever be thought to be a natural channel.

Mr. *Barber* suggested that there was a case which shewed that natural rights could arise in respect of an artificial cut. I have not been able to find such a case. In a case before the Privy Council *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1), Sir *Montague Smith* said (2): "There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *primâ facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin:" that is to say, in one case it would be what we call by grant or prescription; in the other case it is a natural right from the natural stream flowing through a man's land which gives him the rights incident to the ownership of the land. In my opinion it is impossible to say that it ever could be suggested hereafter that this pipe was a natural portion of the stream, and that therefore *Free* could, by being the riparian owner of that cut or pipe, acquire the natural rights of a riparian owner. If he attempts to get any of the rights by user, of course that would at once be an interference, and the Plaintiffs would have a right of action.

The Plaintiffs therefore, in my opinion, have not suggested anything upon which we could say that from the act which has been done without legal authority, although not producing any loss to them now, loss may hereafter result. Therefore, in my opinion, the appeal fails.

(1) 4 App. Cas. 121.

(2) 4 App. Cas. 126.

LINDLEY, L.J.:—

I am of the same opinion. The case was brought into Court on the pleadings as if the Plaintiffs would be prepared with evidence which would support their case. Of course, if their case as pleaded had been supported by the evidence, they would have been right and would have got an injunction. But when they come into Court they produce no evidence at all of that which they allege in their pleadings, and nothing is left to them except this —that they find that the Defendant *Free* has put into this stream above the Plaintiffs' land a pipe, and that *Free* has used that pipe for the purpose of taking water to his sugar manufactory; and that the water when used comes back so that the Plaintiffs are not injured at all. Those are the bare facts.

Upon that, a very ingenious argument has been addressed to us, with a view to persuade us, on the part of the Plaintiffs, that because somebody who is above them is taking some water from the stream he ought to be restrained by injunction, although there is no injury to the Plaintiffs either actual or possible. Of course that is startling. It is not admitted that there is no possibility of injury; on the contrary, it was contended that some possible injury might accrue. But when that contention is looked at closely I think it vanishes. So long as *Free* does that which he is doing there cannot possibly be more injury than he is now inflicting, which is *nil*. Of course, if he does something different, that is another matter. That we are not dealing with. If by means of that pipe he were to impede this stream and not return the water, there would be a cause to complain. As long as he is doing nothing more nor less than he does now there is no possibility of injury at all.

Then failing that, a very ingenious attempt has been made to support this case by trying to force us to carry a step further the decisions as regards non-riparian grants, I mean the *Stockport Waterworks Company* v. *Potter* (1), and *Ormerod* v. *Todmorden Joint Stock Mill Company* (2). It is put in this way. It is said that a man who is not a riparian proprietor has no right to take water from a stream at all, and if I, a riparian proprietor, find anybody who is not a riparian proprietor taking water from the

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(1) 3 H. & C. 300.

(2) 11 Q. B. D. 155.

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stream, although I am not damnified I can maintain an action for an injunction. Now that is a very startling proposition, and one would like to see some authority for it. It goes to an extent which is bordering on the absurd. According to that if I am a riparian proprietor near the mouth of the *Mississippi* and somebody a thousand miles up diverts the water, although not to my detriment, I can sustain an injunction. That is ridiculous.

Let us see what the cases come to, and whether they afford any countenance for a proposition of that kind. When they are looked at they do not do anything of the sort. *Stockport Waterworks Company* v. *Potter* (1) simply decides that the grantee of a riparian proprietor must take the water as he finds it. If it is dirty when it comes to the mouth of his pipe he cannot complain of those who have dirtied it. He has not the rights of a riparian proprietor. The case does not decide that the licensee or grantee of a riparian proprietor cannot take some water from the stream if he hurts nobody

In *Ormerod* v. *Todmorden Joint Stock Mill Company* (2) the decision was that the grantee of a riparian proprietor could not take water and return it in a state so as to do injury to those below him. The argument there was that he could, provided he was doing that which was reasonable. The stress of the contention was that he had all the rights of a riparian proprietor.

Neither of those cases decides that a licensee or a grantee of a riparian proprietor cannot take any water from the stream; they decide nothing of the sort, nor do they warrant any such inference. Yet unless we go that length this argument in support of the Plaintiffs' case cannot be sustained. The argument cannot be maintained unless we say that a riparian proprietor cannot allow anybody to take any water out of a stream whether anybody is injured or not. It seems to me it would be monstrous to decide anything of the sort.

Then it is put in another way, in an extremely ingenious way, in Mr. *Barber's* argument, to the effect that riparian proprietors in a stream are a class of persons in the nature of a close borough, and that anyone of them has a right to object to the introduction into that class of persons who have not got property bordering on

(1) 3 H. & C. 300.

(2) 11 Q. B. D. 155.

the stream. Well, where is the authority for that? It is an ingenious suggestion, but no authority has been cited in support of it, and I am very wary of extending to the discussion of the rights of water an analogy drawn from close boroughs or anything of the sort. I distrust the argument, it strikes me as a false analogy altogether.

It comes back, however, to this, that the right of these Plaintiffs has not been infringed, and that is the answer to the whole case. That is the view which was taken by the Judge in the Court below, and that is the view which we take.

Solicitors for Plaintiffs: *E. Doyle & Sons*, for *Jones & Son, Colchester.*

Solicitors for Defendants: *Philbrick & Free.*

M. W.

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[1882 L. 2845.]

Practice—Examination of Witnesses Abroad—Rules of Supreme Court, 1883, *Order* XXXVII., *r*. 5.

Where it is sought to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must shew clearly that he cannot bring him to this country to be examined at the trial.

THE Plaintiff was the holder of three "founders' shares" in *Smith's Vacuum Brake Company*, and brought this action against the *Vacuum Brake Company*, *C. G. Hale*, and *Smith's Vacuum Brake Company*, to set aside as fraudulent and *ultrà vires* certain arrangements made between the two companies, which he alleged to be prejudicial to his rights as holder of the above shares. *D. M. Yeomans* had been the manager of both companies and had taken an active part in the arrangements complained of. It appeared that he was residing in *America* and had become friendly to the Plaintiff, who was desirous of obtaining his evidence. The Plaintiff accordingly took out a summons, asking that the oral examination in chief, cross-examination and re-examination of *Yeomans*, might be taken at *Chicago* before a special examiner to be appointed for that purpose, or that a commission might issue to take the evidence of witnesses for the Plaintiff in the *United States.*

In support of the application *John Battams,* a clerk of the Plaintiff's solicitors, deposed as follows: "*D. M. Yeomans* in the pleadings mentioned, the person proposed to be examined as a witness on behalf of the Plaintiff herein, is an American citizen, and I am informed and believe is at present residing in *Chicago, Illinois,* in the *United States of America.* The said *D. M. Yeomans* is a material and necessary witness for the Plaintiff in this action, and particularly to prove the facts set out in the notice to admit facts hereinafter mentioned, and I am advised and believe that such facts are material to the issues to be tried in this action."

By a subsequent affidavit the same witness deposed: "I am informed and believe that *D. M. Yeomans,* who was, I believe, the manager of the Defendant *Smith's Vacuum Brake Company, Limited,* as in the amended statement of claim mentioned, is employed in the *Union Switch and Signal Company, Grand Pacific Building,* 232, *Clark Street, Chicago,* in the *United States of America,* and I believe that the said *D. M. Yeomans* cannot come over to *England* to attend and give evidence on the trial of this action. I am able to make the foregoing statements from knowledge derived from letters written by the Plaintiff from *America* to my said principals."

That *Yeomans* was a material witness was not seriously disputed.

Vice-Chancellor *Bacon* refused the application on the 10th of June, 1884. The Plaintiff appealed, and his appeal was heard on the 2nd of July.

One of the Plaintiff's solicitors by an affidavit in support of the appeal deposed as follows: "The said *D. M. Yeomans* was formerly the manager of both the Defendant companies, and was, I believe, co-promoter with the Defendant *C. G. Hale* of the Defendant *The Vacuum Brake Company, Limited,* and is capable of giving most material evidence with reference to the matters complained of by the Plaintiff in this action. He is in no way under the control or influence of the Plaintiff, nor has he any interest in this action or the result thereof, and it would not be possible

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by any means, so far as I am aware, to procure his attendance in this country."

Northmore Lawrence, for the Plaintiff:—

The evidence of the witness is material, reasonable ground is shewn for not bringing him here, and no special reason is shewn why he should be examined here. His examination abroad therefore ought to be allowed: *Armour* v. *Walker* (1). In *Berdan* v. *Greenwood* (2) the person to be examined was the plaintiff himself, and the Court considered that he was keeping out of the way on purpose. In *Crofton* v. *Crofton* (3) examination abroad was refused because there could be no cross-examination. Here it is shewn that the witness is a material witness and that we cannot bring him over.

Maclean, contrà:—

The *primâ facie* right of a party is to have the witnesses who are to give evidence against him examined here, Order XXXVII. rule 1, and the onus is on those who seek to have them examined abroad. The witness is a person who was active in the transactions which the Plaintiff impeaches as fraudulent, and it is important that he should be rigidly cross-examined.

[COTTON, L.J.:—How does it appear that the Plaintiff can get *Yeomans* to come over?]

The burden lies on the Plaintiff to shew that he cannot, and his evidence is of the most loose and unsatisfactory description. It does not even appear that *Yeomans* has been asked whether he will come over. The Court cannot say that it is necessary for the purposes of justice to have him examined at *Chicago*, until it is shewn that otherwise his evidence will be lost.

Northmore Lawrence, in reply:—

The *bona fides* of the application is shewn by this, that the Plaintiff does not ask to be examined abroad; he only wishes to examine abroad a witness whom he cannot bring here.

(1) 25 Ch. D. 673.
(2) 20 Ch. D. 764, n.
(3) 20 Ch. D. 760.

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BAGGALLAY, L.J.:—

This is an appeal from an order of Vice-Chancellor *Bacon* dismissing with costs a summons taken out by the Plaintiff for the examination of a witness named *Yeomans* at *Chicago*, the application being that he should be examined before a special examiner to be named in the order, or that a general commission to examine witnesses for the Plaintiff in the *United States* should be issued.

The action is rather a singular one, and I will very shortly refer to the nature of the claim that is made and to the relative positions of the parties. The Plaintiff seems to have been in a way, which is described in his statement of claim—the allegations in which so far as they relate to the Plaintiff's title I shall for the present purpose treat as correct—an associate of *Yeomans* in introducing a patent into this country, and a company called *Smith's Vacuum Brake Company* was formed here to work it. The capital of the company was £61,010, divided into 3000 preference shares of £5 each and 9000 ordinary shares of £5 each, and ten founders' shares of £1 each to be issued as fully paid up. It appears that none of the 9000 ordinary shares of £5 each were issued. It is then stated that by the memorandum of association of the company it was provided that the preference shares should be entitled to a dividend of 15 per cent. per annum out of the first net profits of the company, and that the ten founders' shares should each entitle the holder thereof to one-hundredth part of the net profits which should remain after payment of the 15 per cent. dividend to the preference shareholders. The Plaintiff acquired an interest early in September, 1876, in three of these ten founders' shares, but the actual transfer of them into his name was postponed until the month of August, 1882, at which time, therefore, he became the owner of those three shares.

The charges in the statement of claim are, that after the Plaintiff had acquired these shares a plot was formed between *Yeomans* and certain other parties, which resulted in the formation of a company called the *Vacuum Brake Company, Limited*, and that arrangements were made by which the *Vacuum Brake Company* in effect swallowed up *Smith's Vacuum Brake Company*, and that thereby the interests of the holders of the ten founders' shares in the old company were materially affected; and there are gross charges of fraud and collusion as to the manner in which these matters were carried out, and the Plaintiff asks for relief on that footing. He has, therefore, in his statement of claim charged *Yeomans*, the person whom it is now asked to bring forward as a witness, with being an accomplice in the acts which are the foundation for the action. It appears that *Yeomans* no longer sides with the Defendants, with whom he is alleged to have been associated in the fraud, but is willing apparently to assist the Plaintiff in his action, and the present application on behalf of the Plaintiff is that he may be allowed to examine *Yeomans* at *Chicago* as regards these matters.

Now, assuming the facts of the case to be as stated in the statement of claim, I think that *Yeomans* is a material witness. He is charged with being an accomplice, and is a person who is now willing to tell the truth as against his accomplices, and he cannot be regarded otherwise than as an important witness.

Then the question is, how is he to be made a witness? He is residing at *Chicago*. Order XXXVII., rule 5, says, "The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or judge, or any officer of the Court, or any other person, and at any place, of any witness or person." Therefore there is no doubt that the Court has jurisdiction to grant the application. But on what principles is that jurisdiction to be exercised? The Court, in considering an application of this nature, will no doubt take into consideration the difference between the expense of the witness being brought over to this country and of his being examined abroad, and the inconvenience, apart from the expense, which may be occasioned by compelling him to leave his occupation in a foreign country and come over to this country to be examined. But it appears to me that if an application is made (whether it is made by the Plaintiff or by the Defendants), for the examination of a witness abroad, instead of his attending in this country to give evidence at the trial, it is the duty of the party making that application, when making it, to bring before the Court such circumstances as will satisfy the

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Court that it is for the interest of justice that the witness should be examined abroad. Now the only evidence that was before the Vice-Chancellor which tended in that direction is contained in the affidavit of *John Battams,* who is clerk to the solicitors of the Plaintiff. [His Lordship read the second affidavit of *Battams.*] Anything more vague than this testimony one can hardly imagine. It is only on information and belief, though it is true that he adds, "I am able to make the foregoing statements from knowledge derived from letters written by the Plaintiff from *America* to my said principals." That is all the information we have got as to the grounds on which it is contended that this gentleman should not be examined in *England.* We have no affidavit from himself, and no evidence from the Plaintiff himself, but it is put upon this clerk's information and belief, followed up by Mr. *Harper's* affidavit. All we have to rely upon is the affidavit of the clerk of the solicitors in *England* as to the information received and derived from letters. In my opinion such evidence is insufficient. But there is a further point to be considered. We cannot shut our eyes to the peculiar position of this witness in relation to the parties to the action. According to the statement of claim, he originally took an active part in the transaction impeached as fraudulent, and he has now become a partisan of the party, who is seeking to set aside that transaction, and he comes forward to give evidence against his own accomplice in the fraud. Now I can hardly conceive a case in which it is more essential that the testimony of the witness should be given in Court at the trial, where he would be subjected to cross-examination. As has been observed in one of the cases, you cannot, by giving instructions to persons in *America* to cross-examine in *America,* provide for making the cross-examination as effective as if it took place here in the presence of persons fully acquainted with all the circumstances of the case. If to avoid this disadvantage you send over the solicitors and counsel of the parties to *America,* you incur an enormous expense. Not only does it appear not necessary "for the purposes of justice," that this person should be examined in *Chicago,* but it would appear that the purposes of justice would very likely be defeated by his being examined elsewhere than in *England.*

For these reasons I think that the appeal should be dismissed with costs.

COTTON, L.J.:—

I think we ought to treat this application as an application to have *Yeomans* examined abroad by a special examiner, and not as an application for a commission. Ought that application to be granted? It depends on the rule that the Court or a judge may order examination of a witness before an examiner where it shall appear necessary for the purposes of justice. The application of that rule must of course depend on the circumstances of each individual case. There is a great difference between a plaintiff and a mere witness as to being examined abroad. If a plaintiff wishes to be examined as a witness on his own behalf, unless there are very strong positive reasons for his not coming over here, leave will not be given to examine him abroad, but he must come here. This is not the case of a plaintiff, but of a witness, and undoubtedly a most material witness—a witness who is coming to give evidence on the part of the Plaintiff to assist the Plaintiff in upsetting for fraud a scheme in which the witness had himself been one of the principal actors. It is most desirable that such a witness should be examined in open Court. If, however, it could be shewn that he could not be induced to come here, or that the Plaintiff could not reasonably be expected to bring him here, I think it would be right to give leave to examine him abroad, and it would be for the Court or the jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him. But I think that in a case of this sort, where it is important that the witness should be examined in Court, a heavy burden lies on the party who wishes to examine him abroad, to shew clearly that he cannot be reasonably expected to come here. On that point the Plaintiff has failed. In my opinion there is not sufficient evidence to satisfy me that this witness cannot be brought here, or will not come here. It is true we are told he is in the service of some company, but we do not know what is the character of his occupation, or whether he would not be able at comparatively small expense to leave for a time his position there, and come over to this country.

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In my opinion, therefore, it is not shewn to be necessary for the purposes of justice that the examination of this witness should take place in *America*, and the appeal must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion, and for the same reasons, but I wish to make one or two additional remarks with reference to the language in Order XXXVII., rule 4, "where it shall appear necessary for the purposes of justice." It means, I suppose, for the purposes of justice between the plaintiff and the defendant. In order to form any judgment upon the justice of their respective cases, we must look at the pleadings to see the nature of the case. Now having looked at the pleadings I am not prepared to say that it is "for the purposes of justice" that all the expense and delay of going out to *Chicago* should be incurred. On the contrary, I think the purposes of justice will be best answered by leaving the witness to come over here if he likes, and stay away if he likes. In other words the Plaintiff's case is apparently of that shadowy, frivolous, and vexatious character that I think it would not be "for the purposes of justice" that we should make this order.

Solicitors for Plaintiff: *Harper & Battcock.*
Solicitors for Defendants: *Linklater & Co.*

H. C. J.

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Sale of Goodwill—Vendor setting up new Business—Right to solicit old Customers.

T. P., as trustee of a will, carried on a business which had been carried on by the testator under the name of *James P.* By an agreement made to compromise a suit, *James P.*, a son of the testator and a beneficiary under his will, agreed to sell to *T. P.* all his interest in the business, and in the property on which it was carried on. And it was provided that nothing in the agreement should prevent *James P.* from carrying on the like business where he should think fit, and under the name of *James P.* *T. P.* brought this action to enforce this agreement, and to restrain *James P.* from soliciting the customers of the old firm. An injunction was accordingly granted by *Kay*, J., on the authority of *Labouchere* v. *Dawson* (1) and the cases in which it had been followed:—

Held, by *Baggallay* and *Cotton*, L.JJ., *dissentiente Lindley*, L.J., that *Labouchere* v. *Dawson* was wrongly decided, and ought to be overruled, and that even apart from the proviso in the agreement, the Plaintiff was not entitled to the injunction which he had obtained.

Held, by the whole Court, that the proviso in the agreement authorized the Defendant to carry on business in the same way as any stranger might lawfully do, and took the case out of the authority of *Labouchere* v. *Dawson*, supposing that case to have been well decided.

JAMES JARVIS PEARSON died on the 1st of October, 1864, having, by will dated the 7th of September, 1864, given all his real and personal estate to the Plaintiff *Theophilus Pearson*, and *John Reed* (who died in 1870), upon trust to carry on the testator's business, and he directed that when his youngest son attained twenty-one a valuation should be made of his business, with the plant, stock in trade, and premises wherein the same should be carried on, and that his daughter should receive one-fourth of the amount of the valuation, and that the remaining three-fourths should be transferred to his three sons (of whom the Defendant *James Pearson* was one) and the Plaintiff in equal shares, with a provision that if upon such valuation being made any of his sons should be unwilling to continue the business and should wish to draw out his share, the amount thereof should be paid or secured to him, and that if none of the testator's sons should be desirous of continuing the said business the trustees should sell the same and the goodwill thereof, with all lands, buildings, and premises thereto belonging.

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(1) Law Rep. 13 Eq. 322.

The testator at his death carried on, among other businesses, the business of a potter and an earthenware manufacturer under the name of *James Pearson*, upon property of which he was the owner. His youngest son attained twenty-one on the 23rd of February, 1881. The businesses were carried on by the Plaintiff up to that time.

On the 21st of June, 1881, the testator's children executed a voluntary conveyance and assignment to the Plaintiff of the businesses of the testator, except that of a colliery proprietor, and of the properties employed in them.

On the 23rd of April, 1883, the Defendant, *James Pearson*, commenced an action against *Theophilus Pearson*, to have the voluntary assignment set aside, and the trusts of the will carried into execution. On the 10th of July, 1883, *Theophilus Pearson* executed a declaration of trust in favour of *James Pearson* of three-sixteenths of the property composed in the voluntary conveyance, and on the same day commenced an action for partition or sale.

After the above action had been set down for trial, negotiations for a compromise took place, which ended in an agreement between *Theophilus Pearson* and *James Pearson*, dated the 27th of March, 1884, of which the following were the material clauses:—

"1. *Theophilus Pearson* shall pay to *James Pearson* £2000 for the purchase of his estate and interest in the property and businesses to which these actions relate, £500 to be paid on the signing hereof and £1500 on completion.

"2. *James Pearson* shall execute a conveyance or assurance of his said estate and interest to *Theophilus Pearson* and shall release all claims against the same, and the said *Theophilus Pearson* shall covenant to indemnify *James Pearson* against all existing liabilities in connection with the said property and businesses. In case of dispute the conveyance or assurance to be settled by the Judge.

"3. Nothing in this agreement shall be deemed to restrict or prevent the said *James Pearson* carrying on and exercising the business of a potter and earthenware manufacturer or any other businesses at such place as he thinks fit, and under the name of *James Pearson*.

"4. *Theophilus Pearson* shall forthwith discontinue carrying on business under the name of *James Pearson*, and intimate the same by circular to the customers within a week."

On the 27th of March, 1884, an order by consent was made in both the causes according to the terms of the above agreement.

Theophilus Pearson, on the 9th of April, 1884, commenced this action against *James Pearson* for specific performance of the agreement, and for an injunction to restrain *James Pearson* from issuing a certain circular, and from soliciting the customers of the late firm to deal with the Defendant. The Defendant, by his statement of defence, referred to letters which passed during the negotiations for the compromise, from which it appeared that the Defendant had been asked to enter into a covenant not to carry on the same business within a certain distance, or a covenant not to solicit custom from any existing customers, and that the Defendant had refused to give any such covenant. The Defendant also relied on the letters as shewing that the parties did not negotiate for a sale of the Defendant's interest in the goodwill, and that it was agreed that he should be at liberty to solicit the old customers; and by counterclaim the Defendant asked that if the Court was of opinion that under the terms of the agreement as it stood the Defendant was not at liberty to solicit the customers or correspondents of the testator's business, then the agreement might be rectified.

On the 1st of May, 1884, Mr. Justice *Kay* made an order on motion restraining the Defendant, until the trial or further order, from issuing the circular, "and from privately, by letter, or personally, or by a traveller, asking any person who prior to the 27th of March, 1884, was a customer or correspondent of the late firm whose businesses were that day sold to the Plaintiff, to deal with the Defendant or not to deal with the Plaintiff."

The Defendant did not appeal from the injunction as to the circular, but appealed from the latter part of the order. The appeal was heard on the 9th and 10th of July, 1884.

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Hastings, Q.C., and *Baker*, for the Appellant, proposed to read the correspondence prior to the 27th of March, 1884.

Robinson, Q.C., for the Plaintiff, objected that the correspondence could not be read to construe the agreement.

Hastings, contrà :—

The letters are admissible, at all events on the counterclaim to rectify. But apart from that they are admissible, for this is in the nature of an action for specific performance; and if a term has been omitted by mistake that is a good defence. When the letters are read, I say it clearly appears to be a term of the agreement, that I should be at liberty to solicit the old customers; and if the agreement as drawn up prevents my doing so, I am taken in. Again, there is nothing in the agreement which in terms prohibits my soliciting the old customers. It is said that if I sell my business I must not do so; but, admitting that to be so, it is a mere presumption of law which can be rebutted. If I contract to sell and make a good title, I cannot avail myself of the purchaser's knowing that there was a flaw in the title, but if I merely agree to sell without expressly stipulating to make a good title, it may be shewn that the purchaser was informed of a blot: *Cato* v. *Thompson* (1).

Robinson, in reply :—

The letters cannot be admitted to explain the agreement.

[COTTON, L.J. :—No; but there being an action to rectify, must we not hear everything that bears on the question whether the agreement as drawn up expresses the real contract?]

The Defendant sold his goodwill, and the legal result of that is that he cannot solicit the old customers.

[BAGGALLAY, L.J. :—If there was a collateral verbal agreement that he should be at liberty to do so, that would be a defence against an injunction.]

There was a dispute between the parties whether the Defendant should be at liberty to solicit the customers, and the negotiation ended in this agreement, which must be taken as expressing the intention of the parties.

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(1) 9 Q. B. D. 616.

[LINDLEY, L.J. :—That may be the result of the evidence; but must we not hear it?]

It is proper evidence to be used at the hearing, but not now. The injunction should be continued till the hearing at all events, on the ground of irreparable damage. If I lose my customers there will be no possibility of getting them back.

BAGGALLAY, L.J. :—

We think that the letters are admissible in evidence. It is consistent with the final agreement that there should have been a collateral agreement giving the Defendant a right to solicit the old customers, and if there was such an agreement the injunction was improperly granted.

COTTON and LINDLEY, L.JJ., concurred.

The letters were then put in and read, but as the decision of the Court did not turn on them they are not further noticed.

Hastings, Q.C., and *Baker*, for the Appellant:—

Apart from the correspondence this injunction cannot be sustained. *Labouchere* v. *Dawson* (1), which is relied on by the Respondent, went on the word "goodwill," which does not occur in the present agreement. In *Ginesi* v. *Cooper & Co.* (2) the late Master of the Rolls extended the doctrine of *Labouchere* v. *Dawson* further. In *Leggott* v. *Barrett* (3) his Lordship extended the doctrine in the same way as in *Ginesi* v. *Cooper & Co.* *Leggott* v. *Barrett* came before the Court of Appeal, and *Labouchere* v. *Dawson* was doubted by two of the Judges, though as the point did not call for decision it was not decided, the defendant having appealed only from so much of the order as went beyond *Labouchere* v. *Dawson*, and that part of the order was discharged. In *Walker* v. *Mottram* (4) the late Master of the Rolls extended the doctrine to a case where the business had been sold by the assignees of a

(1) Law Rep. 13 Eq. 322.
(2) 14 Ch. D. 596.
(3) 15 Ch. D. 306.
(4) 19 Ch. D. 355.

bankrupt. His decision was reversed on appeal, and *Labouchere* v. *Dawson* (1) did not receive unqualified approval. The remark is there made that it went beyond the former cases.

[LINDLEY, L.J. :—There can be no doubt that it did.]

Labouchere v. *Dawson* has never received the collective sanction of the Court of Appeal, and has been doubted by several Judges, it is, therefore, open to review, and we submit that it was wrongly decided. The understanding of the profession has been that the right of a purchaser of a goodwill depended almost entirely on the restrictive covenants in the purchase deed: *Davidson* on Conveyancing (2), and this view is justified by the cases prior to *Labouchere* v. *Dawson*. *Cruttwell* v. *Lye* (3); *Cook* v. *Collingridge* (4); *Kennedy* v. *Lee* (5) all tend to support it. In *Churton* v. *Douglas* (6), Lord *Hatherley* adopts the definition of goodwill given by Lord *Eldon* in *Cruttwell* v. *Lye*, and says that a sale of it gives to the purchaser only the benefit arising from possession of the premises and the stock in trade, and the right of representing that his is the old business. The Plaintiff here took the same view, he asked for a covenant, which was refused. This shews that he thought such a covenant necessary, and according to all the cases before *Labouchere* v. *Dawson* it was. In *Kennedy* v. *Lee* words quite as wide as those used here were evidently in Lord *Eldon's* opinion insufficient to give such a right as is now claimed. But suppose *Labouchere* v. *Dawson* right, we say that it does not govern the present case. Every decision must be looked at with regard to the facts. This is not like the case of a shop; the possession of the beds of clay, which formed part of the assets of the business, is all-important, and the same principle does not apply as in a case where the local goodwill is less important, and the personal connection is of great importance. Another point of difference is that here the Defendant was not a person who had any share in carrying on the business. Again, clause 3 entitles the Defendant to carry on business in the same way as if he had not sold his interest in the old business, and this authorizes him to do whatever a stranger setting up business might do.

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(1) Law Rep. 13 Eq. 322.

(2) 4th Ed. vol. ii. p. 651.

(3) 17 Ves. 335.

(4) Collyer on Partnership, 2nd Ed. p. 215.

(5) 3 Mer. 441.

(6) Joh. 174.

Robinson, Q.C., and *Mulligan*, for the Plaintiff:—

For the vendor of a business to solicit the customers is derogating from his own grant. Suppose a solicitor sold his business, could he set up in the same town and solicit all his old clients to continue with him? Such a proceeding would completely nullify the sale. As to the cases before *Labouchere* v. *Dawson* (1), this point was never raised in them. In *Labouchere* v. *Dawson* the Lord Justice *Baggallay* argued that it was impossible to draw the line, but the decision draws a very intelligible line, and the principle was applied by Mr. Justice *Fry* in *Mogford* v. *Courtenay* (2).

[COTTON, L.J. :—Mr. Justice *Fry* appears there to have been in error in supposing that *Labouchere* v. *Dawson* had been approved by the Court of Appeal, in which case it would have been binding upon him.]

It has never been disapproved of by the Court of Appeal, and in *Walker* v. *Mottram* (3) a majority of the Judges then present expressed their approval of it. It was a righteous judgment, for it would be fatal to the sale of the goodwill of a business, if the vendor could solicit the old customers. It has stood absolutely unimpeached for eight years, and without being in any sense overruled for twelve, it has received a certain amount of approval from the Court of Appeal, it has been repeatedly followed by Courts of first instance, and parties have no doubt in their arrangements acted on the faith of it. It, therefore, ought not now to be disturbed by any Court but the House of Lords: *Pugh* v. *Golden Valley Railway Company* (4). The essence of clause 3 of the agreement was that *James Pearson* was not to be prevented from carrying on business in the name of *James Pearson*, which was the old name of the business as well as his own name; his advisers, rightly or wrongly, thinking that his right to use the old name of the business might be taken away by the sale unless expressly saved, and the clause cannot be construed as authorizing the vendor to do acts which will destroy the business.

(1) Law Rep. 13 Eq. 322.
(2) 29 W. R. 864.
(3) 19 Ch. D. 355.
(4) 15 Ch. D. 330.

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Baggallay, L.J.:—

In this case the Defendant agreed to sell to the Plaintiff his interest in a business, which agreement was carried into effect by an order of the 27th of March, 1884, in another action. In the present action Mr. Justice *Kay* has granted an injunction restraining the Defendant from issuing a certain circular "and from privately by letter, or personally, or by a traveller, asking any person who prior to the 27th of March, 1884, was a customer or correspondent of the late firm, whose businesses were that day sold to the Plaintiff, to deal with the Defendant, or not to deal with the Plaintiff." The Defendant has not appealed as to the circular, but has appealed from the latter branch of the injunction. If the first clause of the agreement, which was confirmed by the order of the 27th of March, 1884, stood alone, I should be of opinion that the sale included the Defendant's interest in the goodwill, and I will first deal with the case as if that clause stood alone.

Treating the case as a simple sale of the Defendant's interest in the goodwill, then if *Labouchere* v. *Dawson* (1) is to be treated as laying down the law correctly, the Plaintiff is entitled to retain his injunction. I have before expressed doubts as to the decision in that case, and the argument which we have now heard not only has not removed those doubts, but has led me to the conclusion that they were well founded. I am aware that the decision in that case has been followed on two or three occasions, it has been approved by one Judge and disapproved by another; but it has never been either approved or disapproved by the Court of Appeal collectively. In that case an agreement in writing was entered into for the sale of a brewery at *Kirkstall*, and the plant, fixtures, utensils, and machinery in and about the same, and the goodwill of the brewery business theretofore carried on upon the premises. Lord *Romilly* there laid down that the seller of a business with its goodwill may, in the absence of any express agreement to the contrary, carry on the same business wherever he pleases, and solicit customers in any public manner, but that he must not apply to any of the old customers privately by letter, personally, or by traveller, asking them to continue their custom with him and not to deal with the vendees. His Lordship went on the principle that persons are not at liberty to depreciate the thing which they have sold. Before that decision the law was to be collected from the cases of *Churton* v *Douglas* (1), and the earlier cases of *Cook* v. *Collingridge* (2) *Cruttwell* v. *Lye* (3), and *Johnson* v. *Helleley* (4). The effect of Lord *Hatherley's* judgment in *Churton* v. *Douglas* is that the vendor may carry on the same business where and as he pleases and deal with the customers of the old firm, provided only that he does not represent himself as carrying on the old business or as being the successor of the old firm. It is admitted that *Labouchere* v. *Dawson* (5) went beyond anything to be found in the earlier cases. There are three decisions on the subject by Sir *G. Jessel*. In *Ginesi* v. *Cooper & Co.* (6) it was distinctly laid down by that learned Judge that a trader who had sold his business and the goodwill of it could not deal with the old customers; the injunction, however, as granted did not go that length, which may be the reason why there was no appeal. In *Leggott* v. *Barrett* (7) Sir *G. Jessel* granted an injunction to restrain the defendant from applying to any customer of the firm privately, or by letter, personally, or by a traveller, asking such customer to continue to deal with the defendant or not to deal with the plaintiff, or from actually dealing with such customer as customer. There was no appeal from the first part of the injunction, but the defendant appealed from the second part, and the Lords Justices *James, Brett*, and *Cotton* all agreed that there ought not to be any injunction against dealing with the customers of the old firm. As the defendant submitted to the first part of the injunction the Court of Appeal did not deal with it, but Lords Justices *James* and *Cotton* suggested doubts as to its propriety. In *Walker* v. *Mottram* (8) Sir *G. Jessel* extended the doctrine of *Labouchere* v. *Dawson* to a case where the goodwill had been sold, not by the trader himself, but by his trustee in bankruptcy. The Court of Appeal held that the doctrine could not be extended to compulsory sales, and that the bankrupt could not be restrained from soliciting the customers of the old business. My colleagues, Lords Justices *Lush* and *Lindley*, did not in that case express any dissent from *Labouchere* v. *Dawson* (1), but used expressions which may be read as tending to shew that they approved of it. I expressed my opinion that it went beyond what any of the previous decisions would have sanctioned, and I reserved my judgment as to its correctness in case the question should ever come before the Court of Appeal. Thus the matter was left in 1881, the Court of Appeal never having in any case given collectively an opinion upon *Labouchere* v. *Dawson*. The case which I then suggested has now occurred, the point calls for our decision, and I feel bound to say that, in my opinion, *Labouchere* v. *Dawson* was not correctly decided. It went beyond a number of decisions of a higher Court, and I think without sufficient reason. It has been argued that as it has stood for twelve years and been acted upon, it ought not now to be overruled, but should be treated by this Court as binding and open to be reviewed only by the House of Lords. In support of this the Respondent relied much on *Pugh* v. *Golden Valley Railway Company* (2), where no doubt stress was laid on the fact that a decision had been standing unimpeached for twelve years, and it was said that it was very undesirable to disturb a rule which had been so long acted upon. The Court, however, did not proceed solely or even mainly on that ground; they were of opinion that the decision referred to was right, and they followed it. The decision in *Labouchere* v. *Dawson* has not stood wholly unquestioned, and I do not think that we are bound to follow it merely because it has stood for twelve years without being authoritatively overruled. Taking the case, then, on the first clause of the agreement alone, I am of opinion that the Plaintiff is not entitled to the second branch of the injunction.

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(1) Law Rep. 13 Eq. 322.

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(1) Joh. 174.

(2) Collyer on Partnership, 2nd Ed. p. 215.

(3) 17 Ves. 335.

(4) 2 D. J. & S. 446.

(5) Law Rep. 13 Eq. 322.

(6) 14 Ch. D. 599.

(7) 15 Ch. D. 306.

(8) 19 Ch. D. 355.

But assuming the first clause, taken *per se*, to amount to a sale of the goodwill, are not its consequences modified by clause 3? That clause, which expressly gives the Defendant a right to carry on any business wherever he pleases under the name of *James Pearson*, appears to me to have an important bearing on the case, and having regard to its terms I think that, even assuming *Labouchere* v. *Dawson* (1) to be right, the Defendant has done nothing which would entitle the Plaintiff to the second branch of the injunction. I rest my decision, however, upon this—that *Labouchere* v. *Dawson* was wrongly decided, and that under clause 1, taken alone, the Plaintiff is not entitled to the injunction.

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(1) Law Rep. 13 Eq. 322.

(2) 15 Ch. D. 330.

COTTON, L.J.:—

Mr. Justice *Kay* granted this injunction, considering that he was bound by the authorities. The case of the Plaintiff is founded on contract, and the question is what are his rights under the contract. There is no express covenant not to solicit the customers of the business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. From what is this implied covenant to be inferred? It is said that there was a sale of the goodwill, and according to the proper meaning of the word "goodwill" I think that there was. The Plaintiff purchased all the interest of the Defendant in certain old pottery works. Taking goodwill in the sense given by Lord *Eldon* in *Cruttwell* v. *Lye* (2), "the probability that the old customers will resort to the old place," we find that here the purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the goodwill as defined by Lord *Eldon*. But the word "goodwill" is not used, and when a contract is sought to be implied we must not substitute one word for another. Such a right as is here contended for might be inferred from a contract to sell the "goodwill," and yet not be inferred from such a contract as we have here. But suppose the word did occur, what is the effect of a sale of "goodwill?" It does not *per se* prevent the vendor from carrying on the same class of business. But in *Labouchere* v. *Dawson* it is laid down that it implies a contract not to solicit the old customers. I think that decision wrong. In *Cruttwell* v. *Lye* (3) the point did not directly arise, for the sale was by assignees in bankruptcy; but Lord

(1) Law Rep. 13 Eq. 322.
(2) 17 Ves. 335, 346.
(3) 17 Ves. 335.

Eldon says (1), "The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration: but, if that effect is prevented by no other means than those, which belong to the fair course of improving a trade, in which it was lawful to engage, I should by interposing carry the effect of injunction to a much greater length than any decision has authorized, or imagination ever suggested." It is involved in this that if goodwill is sold and fraud is used to prevent the sale from having full effect, the Court will interfere; but if customers are prevented by fair means from coming to the old place it will not interfere. In *Kennedy* v. *Lee* (2) expressions are used which are material as regards a contract in the present form. "The words 'concern' and 'inheritance' are used inartificially, and cannot be construed as having any reference but to the actual subjects of valuation. And, when the plaintiff offers to take the business himself, he could not have forgotten that the defendant's own estate lay contiguous to the partnership property, and therefore his introducing no stipulation with reference to the fact of its contiguity is a clear intimation that, when he wrote this letter, he had no intention, in offering to take the partnership property, to purchase with it the goodwill, in the sense of restricting the defendant from carrying on trade in its vicinity. In that sense at least, therefore, the goodwill of the trade was not the subject of contract, or treaty even, between the parties." This, it is true, seems rather to favour the view that a sale of "goodwill" might imply a covenant not to carry on the same trade in the neighbourhood. In *Cook* v. *Collingridge* (3) a partnership business was sold by order of the Court, with liberty for any of the partners to bid, and Lord *Eldon* made an elaborate order, by which, after declarations that there was no obligation restraining any of the partners from carrying on the same business after the sale of the business of the late partnership, and no obligation to restrain them from uniting in a new partnership in the same business after such sale, and that the claim to have any estimated value put upon any subject that could be considered as

(1) 17 Ves. 346.

(2) 3 Mer. 441, 452.

(3) Collyer on Partnership, 2nd Ed. p. 215.

described by the term "goodwill" could not be supported on the same grounds or principles as those upon which a compensation or value was in that establishment received from a partner buying the share of the partner going out of the business of this establishment and retiring from trade or business altogether, it was declared "That in this case, if the property of the then present establishment were sold, and the then present partners, or any of them, with any other persons, engaged in a new establishment carrying on the same trade or business (which they were at full liberty to do), it was obvious, that if by goodwill were meant the value of the chance that the customers of partners retiring altogether would deal with those who purchased from such retiring partners, and succeeded to their establishment, a goodwill of that nature could not be valued on the same principles; as the persons retiring, but not retiring altogether from trade, had also a chance of conveying the old customers with their new establishment, which must most materially affect, if it did not destroy, the chance that the persons purchasing the old establishment would retain many of the customers of the old establishment." A partner, then, in Lord *Eldon's* opinion, might "convey" the customers from the purchaser. He must not do so by unfair means, and it is unfair if he represents that he is carrying on the old business; but I think that Lord *Eldon* was against the notion that the vendor of the goodwill of a business is, in the absence of express contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of goodwill. Lord *Romilly* rests his decision in *Labouchere* v. *Dawson* (1) on the principle that a man cannot derogate from his own grant. But it is admitted that a person who has sold the goodwill of his business may set up a similar business next door and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place. I cannot see where to draw the line; if he may by his acts invite the old customers to deal with him, and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on "goodwill" as would give a right to such an injunction as has been granted in the present case. I have

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(1) Law Rep. 13 Eq. 322.

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thought it right to rest my judgment on the ground that *Labouchere* v. *Dawson* (1) is not to be followed; but the present case is less favourable to the Plaintiff than that case, for not only have we no contract against carrying on the business, but clause 3 shews it to have been in the minds of the parties that the Defendant should carry on business, and I think that this stipulation entitles him to get customers in any fair way of managing his trade.

It is urged that *Labouchere* v. *Dawson* has so long been treated as settled law that we ought not to disturb it. It is true that for eight years that decision does not appear to have been questioned by any Judge, and there is no doubt that it has been followed by other Judges in Courts of first instance. It was, however, doubted in *Leggott* v. *Barrett* (2) by the Lord Justice *James* and myself, and has never received the sanction of the Court of Appeal. I think that under these circumstances we ought not to treat it as binding, and encourage parties to shape their contracts on the authority of a case which the House of Lords may determine to have been erroneously decided.

It is not generally desirable to decide important points on interlocutory applications, but as we come to the conclusion on a question of law that the Plaintiff is not entitled to the injunction, it is, we think, right for us to decide the matter now.

LINDLEY, L.J.:—

The rights of the parties in this action depend on the agreement into which they have entered. That agreement was not an ordinary contract of sale, but an agreement to settle disputes between the parties. If we look at the position of the parties we find that the Plaintiff, *Theophilus Pearson*, as trustee, had carried on this business, and that *James Pearson*, the Defendant, was one of the *cestuis que trust*, had helped in the business, and had been employed in it as traveller. By the agreement *James Pearson* gives up all his interest in the business for £2000. Pausing there, although the goodwill is not in terms mentioned in the agreement, I think that it is included, for a man who sells all his interest in a business cannot retain any interest in the goodwill. Then by clause 3 it is provided that nothing in the agreement

(1) Law Rep. 13 Eq. 322.

(2) 15 Ch. D. 306.

shall be deemed to restrict or prevent *James Pearson* from carrying on the business of a potter and earthenware manufacturer, or any other business, at such place as he thinks fit, and under the name of *James Pearson*. That is an important stipulation, which obviously was introduced for the benefit of *James Pearson*. By it he says, in substance, "Though I have sold to you all my interest in this business, I am to have liberty to carry on business in my own name where I please." That means, "I am to be as free to carry on business as if I had not sold to you, and in the same way as if I had not sold to you." I think, therefore, that this case is not governed by *Labouchere* v. *Dawson* (1), and that the Defendant, assuming *Labouchere* v. *Dawson* to have been rightly decided, may yet solicit the custom of anybody.

As to *Labouchere* v. *Dawson* there has been a difference of opinion. For my own part I am of opinion that it was rightly decided. It is true that, as was pointed out in *Walker* v. *Mottram* (2), it went beyond the preceding cases, but did it go beyond them so far as to be wrong? It went on the principle that a person who has sold the goodwill of his business shall not derogate from his own grant by doing what he can to destroy the goodwill which he has sold. It is true that if this principle were logically carried out, it would prevent the vendor from carrying on the same sort of business as he has sold; and if the Courts had held that he could not, I do not think that the decision could have been complained of. It startles a non-lawyer to be told that if he buys a business and its goodwill, the seller can immediately enter into competition with him next door. The Courts, however, have held that this can be done; but I think that Lord *Romilly* was right in not applying this doctrine to a case where the vendor directly applies to his old customers to induce them to continue dealing with him instead of with the purchaser. Sir *George Jessel* and the Lord Justice *Lush* were of the same opinion, but I believe there are other Judges besides my learned Brothers who think the decision in *Labouchere* v. *Dawson* wrong.

Solicitors for Plaintiff: *Smiles, Binyon, & Ollard.*

Solicitors for Defendant: *Burn & Berridge.*

H. C. J.

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(1) Law Rep. 13 Eq. 322.

(2) 19 Ch. D. 355.

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July 12, 14.

In re ROBINSON.

Lunatic—Divorce—Permanent Alimony—Allowance out of Lunatic's Estate—Assignment—20 & 21 *Vict. c.* 85, *s.* 25 [*Revised Ed. Statutes, vol. xiii., p.* 254.]

On a decree for judicial separation an order was made for payment of £60 a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in Lunacy and Chancery the dividends of a sum of stock to which he was entitled in a Chancery suit were ordered to be carried to his account in the lunacy and £60 a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in Lunacy and in the suit to have the annuity paid to her:—

Held, that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the Court in Lunacy, it was not assignable.

ON the 19th of July, 1861, a decree was made by the Divorce Court for a judicial separation between *Henry F. Robinson* and *Matilda A. Robinson* his wife.

By an order of the same Court, dated the 19th of November, 1861, it was ordered that *H. F. Robinson* should pay to the said *Matilda A. Robinson* permanent alimony after the rate of £60 per annum, to be payable monthly.

In the year 1865 *Henry F. Robinson* was found lunatic by inquisition, and had ever since remained of unsound mind.

By an order made by the Lord Justices in the matter of the lunacy, and in a suit of *Peillon* v. *Brooking*, on the 18th of May, 1880, it was ordered that the interest from time to time to accrue due on £5210 3*s.* 10*d.* Metropolitan Consolidated Stock, then standing in Court in that suit to the account of "The legacy for the benefit of *Henry F. Robinson*, his wife, and children," should, after making certain payments, which reduced it to £4970 3*s.* 5*d.*, be carried over to the credit of "The matter of *Henry F. Robinson*, a person of unsound mind," and that out of such interest, when so carried over, there should be paid, until further order, to *Matilda Robinson* on her sole receipt the annual sum of £60, by equal half yearly instalments of £30, less income tax, in respect of her said alimony, on the days therein mentioned.

By an indenture dated the 30th of November, 1883, *Matilda Robinson*, in consideration of £200, assigned her annuity of £60 payable under the said order to her nephew, *Eugene Robinson*.

By an indenture dated the 14th of December, 1883, *Eugene Robinson* assigned the said annuity of £60, together with other property, to *W. Rutley*, by way of mortgage, for securing the repayment of £750 and interest.

The present petition was presented by *W. Rutley* and *Eugene Robinson* in the matter of the lunacy and in the suit in the Chancery Division, praying that in lieu of the directions given in the order of the 18th of May, 1880, it might be ordered that out of the interest to be from time to time carried over to the credit of the matter in Lunacy the annual sum of £60 during the joint lives of *Henry F. Robinson* and *Matilda Robinson* might be paid to *W. Rutley* until further order.

The petition was adjourned into Court.

Oswald, for the Petitioners:—

Mrs. *Robinson* had full power to assign her alimony. It was made payable to her sole receipt. There are no cases which decide that alimony is not the separate property of the wife, or that she cannot alienate it. On the contrary, *Ex parte Bremner* (1) tends to shew that it is, as it was there held that it is subject to a lien for costs.

The allowance also comes under the 25th section of the Divorce Act, 1857 (20 & 21 Vict. c. 85), which enacts that a wife after the sentence of judicial separation shall be considered a *feme sole* in respect of all property which she shall acquire or which shall come to her.

Malleson, for the Committee:—

The consideration for the assignment was insufficient, and Mrs. *Robinson* was under the influence of her nephew. But our main objection to the petition is that alimony is not assignable by anticipation. It is only an allowance which may be varied by the Divorce Court from time to time, or entirely withdrawn. There may be no cases which in express terms decide this, but there are several cases where there are *dicta* to that effect, and which shew that the Judges must have held that opinion: *Vandergucht* v. *De Blaquiere* (1); *Stones* v. *Cooke* (2); *Ex parte Linehan* (3); *Hyde* v. *Price* (4); *Prescott* v. *Prescott* (5); *Bright's* Husband and Wife (6). Such an allowance is not, therefore, the property of the wife under the 25th section of the *Divorce Act*, 1857. But there is the additional circumstance in this case that the husband is a lunatic, and the order now in question was made in the lunacy. It is an order for an allowance for the maintenance of the wife, and will not be continued for the benefit of a stranger. It is entirely in the discretion of the Court, and cannot be subject to assignment: *In re Weld* (7).

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(1) Law Rep. 1 P. & M. 254.

Oswald, in reply.

Baggallay, L.J.:—

The circumstances of this case are somewhat singular. *Henry F. Robinson* was found to be of unsound mind in 1865, but before that time a suit had been instituted in the Divorce Court, and on the 19th of July, 1861, a decree for judicial separation was pronounced. In November, 1861, an order was made by the same Court for payment of an annual sum of £60 by way of permanent alimony to Mrs. *Robinson* from the date of the order for separation. This order was acted upon till Mr. *Robinson* became of unsound mind; but subsequently an order was made in the matter of the lunacy and in an administration suit pending in Chancery that the dividends on a sum of about £4970 3*s.* 5*d.* Metropolitan Consolidated Stock should be carried over to the lunatic's account in the lunacy, and that an annuity of £60 should be paid out of the dividends to Mrs. *Robinson* on her sole receipt, till further order, in respect of her alimony. It appears that on the 30th of November, 1883, an assignment was executed by Mrs. *Robinson*, by which she purported to assign her annuity of £60 to the Petitioner *Eugene Robinson* in consideration of £200, and that he afterwards mortgaged it to *Rutley*, with other property, for £750, and the present petition is presented by *Eugene Robinson* and *Rutley* asking for payment of the annuity of £60 to *Rutley* instead of to Mrs. *Robinson.*

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(1) 8 Sim. 315; 5 My. & Cr. 229.

(2) 8 Sim. 321, n.

(3) 1 J. & Lat. 29.

(4) 3 Ves. 437.

(5) 20 L. T. (N.S.) 331.

(6) Vol. ii. p. 361.

(7) 20 Ch. D. 451.

This petition has been opposed on two grounds, first, that there was insufficient consideration for the assignment; and secondly, on the ground of the inalienable character of alimony.

I prefer, however, to deal with the case on a short point, without deciding either of these questions. When a man is found to be of unsound mind, the Court is in the habit of making allowances for the wife and children and other near relatives of the lunatic, for their personal benefit. When Mr. *Robinson* was first found to be a lunatic, it was within the ordinary jurisdiction and practice of the Court to consider what sum would be proper to allow his wife out of his income, and as an order had been made for paying a certain sum to her in respect of her alimony, the Court considered that was a proper allowance to make her. Perhaps it is too strong a word to use, to say that it was given out of charity, but it was an allowance made out of the lunatic's income for the personal maintenance of his wife. But now the reason for that payment no longer exists, it is no longer to be applied to the maintenance of his wife, but is to be applied to other purposes. I think, therefore, the payment ought no longer to be sanctioned.

In the Ecclesiastical Court it is the practice to vary or stop the payment of alimony according to the position or conduct of the wife, and if it were necessary to give an opinion on the question, I should be inclined to decide that alimony was not alienable. But I do not think it is necessary to decide that question in the present case, because, having regard to the practice of this Court in Lunacy, we should not be justified in continuing the allowance when it was not to be applied to the maintenance of the wife, but to be paid to other persons. The petition must, therefore, be dismissed.

COTTON, L.J.:—

This is a petition by the assignee of an allowance for alimony made by an order in Lunacy to have the allowance paid to him out of the lunatic's property. To my mind this turns on the question whether alimony is alienable or not. It is said that the wife became entitled to deal with it as if she were a *feme sole,* under the 25th section of the *Divorce Act,* 1857, as being property acquired by her after the decree. I do not think it is within the section referred to. But I do not decide this case on that ground, because the very nature of alimony is inconsistent with its being capable of assignment. We are familiar with instances of allowances which are not alienable in the case of men, such as the half-pay of the officers in the Army and Navy, which are given them in order that they may maintain themselves in a sufficient position in life to enable them to be called out for future service if required. Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the Court thinks right to be paid for her maintenance from time to time, and the Court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the Court from time to time to provide for the maintenance of the wife. Therefore it was not assignable by the wife. How far she might dispose of the arrears or of her savings is a different matter: here the question is whether she can deprive herself of the benefit of it by anticipation. Therefore treating it as merely a question of alimony, I am of opinion that this lady had no power to assign her annuity.

I do not disagree with what Lord Justice *Baggallay* has said on the question of allowances made by the Court in Lunacy for the maintenance of the wife and children of the lunatic; but I think the only question here is whether the order in Lunacy put the assignee in a better position; and I am of opinion that the order in Lunacy was only a mode of providing for carrying out the order for alimony, and that it did not put the assignee in any better position than if no such order had been made. As the alimony is not itself alienable by anticipation, I do not think the assignee can get any advantage from the order in Lunacy, and that this petition must fail.

LINDLEY, L.J.:—

I am of the same opinion. The question whether alimony is assignable has never been distinctly decided; but the nature of

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alimony has been often discussed, and there are cases which, in my opinion, tend to shew that it is not alienable. For instance, the Ecclesiastical Courts could not enforce arrears of alimony beyond one year. Then also in *Vandergucht* v. *De Blaquiere* (1) it is plain that both the Judges thought that alimony could not be dealt with as if it was the separate property of the wife. To the same effect is *Stones* v. *Cooke* (2); and *Prescott* v. *Prescott* (3) shews that a claim to alimony is not provable in the husband's bankruptcy. All these cases tend to shew that alimony is not assignable, and is only an allowance made by the Ecclesiastical Court and revocable by the same Court.

I am also of opinion that alimony is not property within the meaning of the 25th section of the *Divorce Act*, which makes a wife a *feme sole* with respect to property which she may acquire after the sentence of judicial separation. It is not property in its proper sense; it is like an allowance made by a husband to his wife or a father to his child.

In addition to this, we have this circumstance—that this is a petition asking the Court sitting in Lunacy to change the order for payment of an allowance to a wife, and to make it payable to her assignee. I entirely concur with Lord Justice *Baggallay* that the Court is under no obligation to do any such thing. The assignee is certainly not in a better position by reason of the order in Lunacy than if there had been no such order. I agree that the petition must be dismissed.

Solicitors: *G. J. & P. Vanderpump; Wadeson & Malleson.*

(1) 8 Sim. 315; 5 My. & Cr. 229.
(2) 7 Sim. 22; S. C. 8 Sim. 321, n.
(3) 20 L. T. (N.S.) 331.

M. W.

C. A.
1884
July 3, 15.

In re MARCH.
MANDER *v.* HARRIS.

[1883 M. 1931.]

Will—Construction—Gift to Husband and Wife and Third Person—Unity of Person of Husband and Wife—Separate Use—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5.

A testatrix, by her will, dated in 1880, gave her residuary personal estate "to *C. J. M.*, and *J. H.* and *E.* his wife," to and for their own use and benefit absolutely, and appointed *C. J. M.*, and *J. H.* and *E. H.* his wife, her executors.

The testatrix died in 1883, after the commencement of the *Married Women's Property Act*, 1882. *J. H.* and *E. H.* were married in 1864.

Held (reversing the decision of *Chitty*, J.), that as the will was made before the *Married Women's Property Act* came into operation, it must be construed in accordance with the law at that time, and that the three residuary legatees were entitled to the personal estate as joint tenants, *C. J. M.* taking one moiety, and *J. H.* and *E. H.*, his wife, taking the other moiety between them, *J. H.* in his own right, and his wife for her separate use.

How the Court would have construed the gift if the will had been made after the *Married Women's Property Act*, 1882, came into operation, *quære*.

THIS was an appeal from a decision of Mr. Justice *Chitty* (1).

Fanny Elizabeth March, widow, by a holograph will, dated the 8th of December, 1880, bequeathed certain specific articles and then gave all the residue of her real and personal property in the following words:—"Unto my residuary legatee, *Charles James Mander*, Esq., No. 9 *New Square, Lincoln's Inn, London*, and *James Harris*, Esq., and *Eliza Maria*, his wife, of *Knowle Green, Staines, Middlesex*, to and for their own use and benefit absolutely." And she appointed *Charles James Mander*, Esq., and *James Harris*, Esq., and *Eliza Maria Harris*, his wife, executors of her said will.

The testatrix died on the 26th of April, 1883, possessed of personal property only, and no real estate.

James Harris and *Eliza Maria Harris* were married in 1864.

This action was brought by *C. J. Mander* against Mr. and Mrs.

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(1) 24 Ch. D. 222.

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Harris to obtain a declaration that, according to the true construction of the will, the estate of the testatrix was divisible in moieties, and that the Plaintiff was entitled to one of such moieties.

The Defendants demurred to the statement of claim on the ground that, having regard to the terms of the will and to the provisions of the *Married Women's Property Act*, 1882, which came into operation on the 1st of January, 1883, the estate of the testatrix was divisible in equal thirds and not in moieties, and that the Plaintiff was entitled only to one third.

Mr. Justice *Chitty* decided that the personal estate was divisible in thirds, and from this decision the Plaintiff appealed.

Rigby, Q.C., and *R. F. Norton*, for the Appellant:—

The case was argued in the Court below on the assumption that the will was to be construed in the same way as if it was made after the *Married Women's Property Act*, 1882, came into operation. Even on that assumption we submit that the decision of Mr. Justice *Chitty* is erroneous. The new Act does not alter the *status* of a married woman; she still remains in law one person with her husband. It does not alter her power of acquiring property, but only the destination of the property after she takes it. The rule by which a married woman and her husband take in entirety has been settled since the time of *Littleton* (1). It is a rule of construction not of law, and there has been nothing to change it. The use of the word "and" between the gift to *Mander* and the gift to *Harris* and his wife, is a strong indication of the intention of the testatrix to divide the gift into two moieties: *Bricker* v. *Whatley* (2); *In re Wylde* (3); *Dias* v. *De Livera* (4); *Attorney-General* v. *Bacchus* (5). But in the present case the will was in fact made before the Act came into operation, which was on the 1st of January, 1883. Therefore the words of the will ought to be construed as the law stood before the Act passed, and must be governed by the old authorities: *Jones* v. *Ogle* (6).

(1) Co. Litt. 187 a.

(2) 1 Vern. 233.

(3) 2 D. M. & G. 724.

(4) 5 App. Cas. 123.

(5) 9 Price, 30; S. C. 11 Price, 547.

(6) Law Rep. 8 Ch. 192.

Macnaghten, Q.C., and *Bardswell*, for the Defendants:—

It was not a mere rule of construction that a man and his wife took by entirety; it was based upon the law as it formerly stood that a married woman was one with her husband. But the effect of the *Married Women's Property Act*, 1882, has destroyed the unity so far as property is concerned. By sect. 1, sub-sect. 1, it is enacted that a married woman can take separate estate without the intervention of a trustee, and by sect. 5 that property acquired by her after the commencement of the Act, which applies to this case, shall be held by her as a *feme sole*. Even before the Act the rule of construction was not uniformly acted on, as in *Warrington* v. *Warrington* (1), which was very similar to the present case. The fact that the will was made before the Act came into operation makes no difference; it must be construed according to the state of the law at the death of the testatrix: *Hasluck* v. *Pedley* (2)

Rigby, in reply.

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The will in this case was executed in 1880, and came into operation in April, 1883. In the interval the *Married Women's Property Act*, 1882, was passed, and we have to consider the effect, if any, of that Act upon this will. By the will of the testatrix she bequeathed her residuary personal estate to *Mander*, and *Harris* and *Eliza*, his wife, to and for their own use and benefit absolutely, and she appointed them executors of her will. If this will had come into operation before the 1st of January, 1883, the testatrix's residuary personal estate would have been divisible into moieties; *Mander* would have taken half, and *Harris* and his wife would have taken the other half as one person. This we think clear upon the authorities, and it was in fact hardly disputed. But it was contended that the *Married Women's Property Act* had the effect of altering the law in this respect and of giving to each of the residuary legatees a one-third share. This, moreover, was the view taken by the learned Judge in the Court below. Mr.

(1) 2 Hare, 54.

(2) Law Rep. 19 Eq. 271.

Justice *Chitty* examined at considerable length the effect which the *Married Women's Property Act* would have had upon this will if it had been made after that Act came into operation, and he came to the conclusion that if the will had been so made the residuary legatees would have taken in thirds. It is not necessary for us to decide this point, and we express no opinion upon it. We have to deal with a will made before the statute in question came into operation, and we confine our observations to wills so made. Now, in applying the *Married Women's Property Act* to wills made before the Act was passed, care must be taken not to make it operate retrospectively further than is unavoidable. There is no section in the Act (unless it be sect. 5) which requires us to construe a will made before the Act came into operation otherwise than as such will would have been construed if the Act had not passed. Sect. 5 of the Act does not require this to be done. It does not require it in terms, nor does it by necessary implication. Sect. 5 provides for women married before the commencement of the Act, and by force of that section Mrs. *Harris* is entitled to have and to hold and to dispose of in manner previously mentioned in the Act—*i.e.*, by deed or will—as her separate property whatever accrued to her under the will in question. What, then, did she acquire under the will? That depends upon the proper construction of the will, and for purposes of construction those rules which prevailed when the will was made and with reference to which wills may be fairly presumed to have been framed must be observed. The reasoning of the Lord Chancellor in *Jones* v. *Ogle* (1) upon this point appears to us unanswerable, and we do not regard the case of *Hasluck* v. *Pedley* (2) as really inconsistent with this view. In that very case the Master of the Rolls (Sir *G. Jessel*) said, "The Act does not affect the meaning of the will; it only alters its legal operation." The construction is not altered, though the legal effect may be different, as was pointed out by Lord Justice *Fry* in *Constable* v. *Constable* (3). In this case, and as regards the share given to Mr. *Mander*, we are unable to distinguish the construction of the will from its legal effect. The testatrix by her will, construed as it would have been when she made it, gave Mr. *Mander* a half of her residuary estate. We can find nothing in the statute to alter this construction or to diminish the share given to him. Neither does it enlarge or diminish the share given to Mr. and Mrs. *Harris*. But the statute has a very important effect on her interest in that share. The moiety given to her and her husband is in effect given to her and him as joint tenants as if she were unmarried. Practically, therefore, *Mander* will take one half, Mr. *Harris* will take a quarter, and Mrs. *Harris* will take a quarter for her separate use. This appears to us to be the necessary consequence of sect. 5, but we cannot construe that section as having any other operation on this will. In this respect we think the decision of the Court below erroneous. The order appealed from ought therefore to be discharged, and in lieu of it the order should be that the Court, being of opinion that the three residuary legatees are entitled to the residuary estate as joint tenants and that *Mander* is entitled to half, and that Mr. and Mrs. *Harris* are entitled to the other half, he in his own right and she for her separate use, overrule the demurrer.

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(1) Law Rep. 8 Ch. 195.

(2) Law Rep. 19 Eq. 271, 274.

(3) 11 Ch. D. 681.

COTTON, L.J.:—

I am of the same opinion as regards the result, and I should not add anything except that I wish to state more emphatically than I think has been done by Lord Justice *Lindley*, that the old rule that a gift to *A*. and to *B*. and *C*. his wife, was a gift of one moiety to *A*. and of the other to *B*. and *C*. his wife, is merely a rule of construction. That it is only a rule of construction, is shewn by the fact that very slight expressions of intention to the contrary have led the Court to depart from the rule. I admit that although it is a rule of construction it was no doubt laid down having regard to the state of the law at that time. I add what I have said because this view was to some extent lost sight of during the argument and in the judgment of Mr. Justice *Chitty*. And it will no doubt be very important when the case arises to remember this when the will has been made after the passing of the *Married Women's Property Act*. In my opinion the Act was not intended to alter any rights excepting those of the husband and wife *inter se*. What the effect will be when words similar to these occur in a will made after the Act came into operation, I do not say.

BAGGALLAY, L.J.:—

The judgment of Lord Justice *Lindley* entirely expresses my view, but I do not at all dissent from the views expressed by Lord Justice *Cotton.*

LINDLEY, L.J.:—

Nor do I.

Solicitors: *Burton, Yeates & Co.*, agents for *Horne & Engall, Staines; F. Fitz Payne.*

M. W.

V.-C. B.
1884
June 10, 13.

In re DAMES AND WOOD.

Vendor and Purchaser—Conditions of Sale—Right to rescind.

Property was purchased under a condition that "if the purchaser shall take any objection or make any requisition" as to the title which the vendor "is unable or unwilling to remove or comply with," the vendor might rescind the contract. A deposit was paid; and requisitions having been sent in, with several of which the vendor, for reasons stated, "declined to comply," the purchasers insisted on their requisitions, and the vendor, after an interval, served the purchasers with notice to rescind.

The purchasers, in reply, denied the vendor's right to rescind, but said they would withdraw the requisitions, and were willing to complete:—

Held, that the contract was rescinded, and that the purchasers were not entitled to have a conveyance on payment of the balance of the purchase-money.

THIS was a summons, in the matter of a contract for the sale of an estate made between *Richard Dames* and *Henry Wood*, the latter as agent for Sir *Julian Goldsmid* and four other persons, under the *Vendor and Purchaser Act*, 1874, on behalf of the five last-mentioned persons, that it might be declared that they were entitled to have conveyed to them by the vendor, and other necessary parties, the hereditaments comprised in the above-mentioned contract for sale, on payment of the balance of the purchase-money, the five last-mentioned persons (the purchasers) having withdrawn all objections and requisitions on the title which the vendor "was unwilling to remove or comply with."

The contract, dated the 7th of August, 1883, was made subject to certain printed conditions of sale, one of which (the 11th), was (in part) as follows:—

"If the purchaser shall take any objection or make any requisition as to the title, evidence, or commencement of title, conveyance, or otherwise, which the vendor is unable or unwilling to remove or comply with, the vendor may by notice in writing, delivered to the purchaser or his solicitor, and notwithstanding any intermediate negotiation, rescind the contract for sale, and the vendor is, within one week after such notice to repay the purchaser his deposit money, but without any interest thereon, which is to be accepted by him in satisfaction of all claims on any account whatever, and the purchaser is to return forthwith all abstracts and papers in his possession belonging to the vendor."

The property, situate at No. 84, *Leman Street, Whitechapel, Middlesex*, and occupying an area of about 2100 square feet, was, by the above contract, sold by *Richard Dames* to *Henry Wood*, as such agent as aforesaid, for £2000, and a deposit of £200 was paid.

On the 15th of August, 1883, requisitions on title were sent in. By the 2nd the vendor was required to shew that a sum of £18,000, being a legacy under the will of a testator named *C. R. Dames*, had been duly set apart, and that all the testator's debts had been paid. The 4th was an inquiry whether there was anybody who could claim dower as the wife or widow of *Richard Dames*, the grantor of a deed of the 6th of June, 1865. The 5th inquired for evidence as to whether the debts of *George Dames* (who died in 1869) had been paid. The 8th related to the construction of a decree, and asked which Defendant was referred to therein. The 9th was a requisition for four additional abstracts and production of the documents. The 10th was a requisition for another additional abstract of title to a house, No. 18, *Tenter Street East*. The 13th was a requisition for proof that the right to use thirteen windows was granted to the adjoining owners by the owners of the property sold, and other consequential evidence.

On the 8th of September, 1883, the vendor sent answers to requisitions. In answer to the 2nd he said he disputed the statement on which the inquiry respecting the £18,000 was based. Also that the testator, *C. R. Dames*, died in 1861, and any debts owing by him must therefore be statute-barred; and he declined to comply with the requisition. In answer to the 4th requisition, the purchasers were referred to condition 7, which was that it should be assumed that every former owner of any part of the property, whose widow (if any) would have been entitled to dower, and was not mentioned in the title, did not leave a widow. In answer to the 5th, he said he had no evidence. The 8th was answered by giving the name of the Defendant required. In answer to the 9th the vendor said, "We do not see how this affects the title to the property sold, and must decline to comply with the requisition." In answer to the 10th, it was stated that the property referred to was part of the same building as that sold, and the title the same, and that there were no separate deeds relating to the property. The answer to the 13th was, "the windows having been already bricked up prior to sale, further compliance with this requisition would seem to be unnecessary."

On the 10th of September replies to answers were sent. As to the 2nd, the purchasers said, "This reply is unsatisfactory, and the purchaser reserves his right to insist." To the 4th, "The vendor must state whether any application has been made, or anything paid in respect of dower. If the answer be in the negative, the purchaser will be satisfied." To the 5th, "Evidence must be furnished." To the 8th, "We must ask the vendor to produce this decree again." To the 9th, "These statements are brought upon the title, and consequently the vendor must prove them." To the 10th, "This answer is most unsatisfactory, and cannot be accepted. A title must be shewn." To the 13th, "This is not sufficient. The bricking up of the windows may only be for temporary purposes. The purchaser must insist upon the requisition."

No further answers to these replies were sent, but on or about the 20th of November the vendor delivered to the purchasers a notice that "being unable or unwilling to remove or comply with the objections and requisitions taken and made by you as to the title of No. 84, *Leman Street*. . . . I do in the exercise of the power for that purpose given and reserved to me by the 11th condition of sale, hereby rescind the said contract for sale to you, and that I am ready and willing and hereby offer to repay to you the deposit money paid in respect of such purchase."

In answer to this notice the purchasers' solicitors wrote to the vendor's solicitors as follows; "We deny the vendor's right to rescind the contract. . . . It is his duty to give us such information in his possession or that of his solicitors or agents as to the matters referred to in our requisitions so far as they are subsequent to the date of the commencement of the title, and such title to No. 18, *Tenter Street*, whether by possession or otherwise, as he can shew, but as we infer from your notice that the vendor is either unable or unwilling to comply with the objections and requisitions as to the title which remain unsatisfied, we hereby intimate to you that our client withdraws all such objections and requisitions, and that he is willing to complete the purchase."

On the 7th of December a draft conveyance was sent; but it was not returned.

No actual tender of return of deposit had been at any time made by or on behalf of the vendor; and on the 8th of July this summons was taken out.

Solomon, for the summons:—

The notice to rescind was improper, and is invalid. The vendor gives no explanation of the character of his objections. He does not tell us which of the requisitions he is unable, and which he is unwilling, to remove or comply with. In order to entitle a vendor to avail himself of such a condition as this, there must be shewn either absolute inability, or the unwillingness must be shewn to be reasonable: *Roberts* v. *Wyatt* (1); *Page* v. *Adam* (2); *Greaves* v. *Wilson* (3); *Turpin* v. *Chambers* (4). The remarks of Sir *G. Turner*, L.J., in *Duddell* v. *Simpson* (5), apply directly to this case. His Lordship says: "Those cases," referring to the cases which had been cited, "have settled, and I think, very wisely settled, that the word 'unwilling' in a condition of sale of this description, is not to be considered as giving an arbitrary power to the vendor to annul the contract. I think that in a case where the vendor annuls the contract on the ground of unwillingness, he must shew some reasonable ground for unwillingness. . . . But to say that a vendor, upon a condition of that description, could annul a contract *brevi manu*, without attempting to answer any of the requisitions which are made on the part of the purchaser, would be opposed both to principle and authority; for that would, in truth, be giving to the vendor the power of saying that that which was intended as a sale, and was a sale, shall, in truth, be no sale at all."

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(1) 2 Taunt. 268.
(2) 4 Beav. 269.
(3) 25 Beav. 290.
(4) 29 Beav. 104.
(5) Law Rep. 2 Ch. 102, 107.

Russell Roberts, for the Respondent, the vendor:—

The rescission was an absolute rescission under a condition which formed part of the contract; and nothing that the purchasers have done or could do afterwards has or could have the effect of setting it up again. The argument on the other side seems to imply that there must be read into the condition a right of the purchaser to have a *locus pœnitentiæ*, or an opportunity of withdrawing his objections after rescission, and thereby of annulling the rescission. This is unsustainable.

But was this an arbitrary or a capricious refusal "to remove or comply with" the requisitions?

[BACON, V.C., stopped the argument on this point, and observed that, no matter how unreasonable, however provocative, the requisitions may have been, the question was simply one of construction of the condition.]

Roberts:—Then the right of the vendor to rescind is clear.

In the case of *Duddell* v. *Simpson* (1), already cited, which is an authority in the vendor's favour, Lord Justice *Turner* disposes of the contention which has been here raised. He says (2): "Another ground relied upon was, that the notice ought to have given time to the purchaser to determine whether he would or would not waive the objection which he had taken, and that the contract could not be well determined by a notice without such time being allowed. But I do not find any such stipulation in the conditions of sale." Nor is there any such stipulation in these conditions.

Then Lord *Cairns*' remarks are equally applicable (3). "First," he says, "there must be an objection to the title; secondly, there must be an inability or unwillingness on the part of the vendor to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; and fourthly, there must be an insisting by the purchaser on his objection, notwithstanding this communication." All these four circumstances exist in this case.

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(1) Law Rep. 2 Ch. 102.

(2) Law Rep. 2 Ch. 107.

(3) Law Rep. 2 Ch. 109.

Solomon, in reply :—

No answer has been given to the argument founded on Lord Justice *Turner's* ruling, viz., that where the vendor annuls on the ground of unwillingness, he must shew some reasonable grounds for unwillingness. No such reasonable grounds have been shewn in this case.

Moreover, if the inability or the unwillingness really or reasonably existed, we ought, according to Lord *Cairns*' ruling, before any right to rescind could arise, to have had an opportunity of declaring whether we adhered to our objections or not.

BACON, V.C. :—

No doubt this is a case of some importance. A man has an estate to sell, and he takes care to stipulate in the contract that "if the purchaser shall take any objection, or make any requisition as to the title, evidence or commencement of title, conveyance, or otherwise, which the vendor is unable or unwilling to remove or comply with, the vendor may, by notice in writing, rescind the contract;" and then the vendor is to repay the deposit money, and to retain the papers in his possession.

Now what is the meaning of being "unable or unwilling" in the contemplation of the vendor? He knows it is possible that captious, unreasonable, and minute requisitions may be tendered, and he protects himself on two grounds. He says, "I may be unable or I may be unwilling." He may wish to protect himself against being compelled to take the trouble, or to incur the expense of removing an objection. It may cost him a great deal of money, certainly it must cost him trouble; and he says, "I will neither take trouble, nor spend money, I am unwilling to do either—therefore I protect myself by this condition. If any case of that sort should happen, if a purchaser gives or proposes to give me any trouble I do not like to take, I will have a right to say, 'There is an end of the bargain between us.'" The unwillingness is as much a part of the contract as the inability. The vendor having reserved to himself the right of saying that he is unwilling, nobody has a right to inquire why he is unwilling. He says in effect "If I comply with your request I shall have to go here and there and find out the means of answering your

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requisition, and I am unwilling to take that trouble; therefore I protect myself by this condition." That is the plain sense and meaning of the contract.

But it does not depend upon the mere construction of the contract, because the subject is entirely covered by the decision of *Duddell* v. *Simpson* (1), in which Lord Justice *Turner's* view does not differ from that of Lord *Cairns*, though words may be found in Lord Justice *Turner's* judgment which may be thought to sustain the argument on behalf of the purchasers. The Lord Justice goes into the matter very minutely and gives the various heads upon which a vendor may justly avail himself of such conditions as there existed, and it is put thus. Lord *Cairns* says (2), there are four matters which must concur before there is a right to give a notice to rescind; I need not go into them; and he brings it to this—there comes a time at which the purchaser insists on a certain requisition—at that time the vendor is unwilling to comply with that requisition—the purchaser still insists, and says, "I will have that requisition complied with." What is the vendor to do then? Is his contract to be a nullity? Is he not to be protected in the way he has protected himself? He says, not in words, but in substance, "Since you are so persistent, since you compel me or say you will compel me to answer this requisition—the alternative being that the bargain may go off and some claim for damages may arise—since you will insist on this requisition which I tell you I ought not to comply with, and will not comply with, the right arises in my favour to put an end to the contract."

In this case the vendor by the notice of the 20th of November, did put an end to the contract; and from that date there is no contract in existence. If the vendor has a right to put an end to the contract, and has put an end to it, there exists a contract no longer. I am not going into the captious nature of the requisitions, because it is not necessary for me to do so. If it were necessary, I might have a good deal to say about the insisting on the evidence of the payment of a debt of the testator twenty years before the question arises, and about the windows, and so on; but these things I do not refer to, and they form no

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(1) Law Rep. 2 Ch. 102, 107.

(2) Law Rep. 2 Ch. 109.

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ingredient in my judgment. On the plain terms of the contract, contained in the conditions of sale, the vendor reserved to himself a right. The purchaser has put him in a position in which he can resort to that right rather than incur the expense or take the trouble of complying with the requisition. The vendor has resorted to that right, and in my opinion he was justified in so doing, and the summons must be dismissed with costs.

Solicitors: *Emanuel & Simmonds; Brook & Chapman.*

J. B. D.

In re BROWN'S WILL.

V.-C. B.
1884
June, 23, 27.

Settled Estate—Tenant for Life—Sale—Mansion-house—Heirlooms—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 15, 37—*Practice—Service.*

A testator bequeathed to his trustees certain articles as heirlooms to be annexed to his mansion-house and held in trust for the person for the time being entitled to the mansion-house under the equitable limitations thereinafter contained; and he devised his mansion-house and estate, comprising about 360 acres, to the trustees upon trust for his son for life, with equitable remainders over in strict settlement for the benefit of the son's issue: and the testator directed that his mansion-house and certain lands thereto belonging, comprising about thirty acres, and described on a plan indorsed on the will, should be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms should at all times be kept in the mansion-house. Powers were given to the trustees to let, sell, or exchange any part of the settled estate except the mansion-house and lands described on the plan.

The testator's son, the tenant for life, being desirous of selling the whole estate under the powers of the *Settled Land Act*, 1882, applied to the Court under sect. 15 for leave to sell the excepted mansion-house and lands, on the ground that, owing to ill-health and permanent residence elsewhere, he was unable to reside in the mansion-house, and also that, inasmuch as the estate was in proximity to a large town, the bulk of the estate could not be sold advantageously without the mansion-house and adjoining lands. The summons did not ask for the sale of or contain any reference to the heirlooms:—

Held, that, on the evidence, the case was a proper one for a sale of the mansion-house and adjoining lands, but that leave for sale would not be granted without some direction as to the disposal of the heirlooms.

The summons was then amended, with the consent of the trustees by asking for leave to sell the heirlooms also, under sect. 37 of the *Settled Land Act*, 1882, by reference to an inventory verified by affidavit, whereupon an order was made for the sale of the heirlooms with liberty for the tenant for life to bid at such sale.

Service of the summons on the children of the tenant for life was dispensed with, their interests being sufficiently represented by the trustees, who had been served.

ADJOURNED SUMMONS.

John Bowen Brown, by his will, dated the 11th of November, 1871, bequeathed certain pictures, statuary, and other articles in his mansion-house called *Woodthorpe Hall*, in the parish of *Handsworth, Yorkshire*, to four trustees with a direction that the same should be considered as annexed to his said mansion-house as heirlooms, and be held in trust for and enjoyed by the person or persons for the time being entitled to the said mansion-house under the equitable limitations thereinafter contained, and that an inventory should be taken of such heirlooms. And the testator devised his said mansion-house and the outbuildings and gardens thereto belonging, and all other his real estate, to the use of the said trustees and their heirs in trust for his son *Richard Edward Brown* (who afterwards assumed the surname of "*Brown-Greaves*") for life, without impeachment of waste, with remainders over in trust in strict settlement for the benefit of the wife and issue of the said *R. E. Brown-Greaves*. And the testator directed that his said mansion-house, and the lodge, outbuildings, gardens and certain lands thereto belonging, all which said premises contained 30A. 0R. 9P., or thereabouts, and were delineated and coloured respectively blue, brown, and pink on the plan indorsed on the will, should at all times (except during the minority of any male, or the minority and discoverture of any female who should, or if of full age would, be entitled to the possession thereof under his will) be kept up as a place of residence of the person for the time being entitled to the possession thereof under his will, and be kept by such person in good and sufficient order and repair, and adequately insured against fire; and that the said heirlooms thereinbefore bequeathed, should at all times (except as last aforesaid) be kept in his said mansion-house. The will contained powers for the trustees to grant leases for twenty-one years of any of the devised premises, except those coloured blue, brown, and pink; to grant mining leases for sixty years of any of the same premises (except as aforesaid); to grant way-leaves or other easements over any of the same premises (except as aforesaid); to sell or exchange any of the same premises (except as aforesaid); and to reserve mines and minerals on the sale of any of the premises comprised in the power of sale.

The testator died on the 21st of August, 1876, whereupon his son *R. E. Brown-Greaves* became equitable tenant for life of *Woodthorpe Hall* and the remainder of the settled estates. The *Woodthorpe Hall* estate, including the "excepted" lands, comprised about 360 acres.

New trustees of the will were appointed by the tenant for life under a power contained in the will, and in February, 1884, an order was made by his Lordship appointing them trustees for the purposes of the *Settled Land Act*, 1882.

The tenant for life, being desirous of selling the surface of the entire *Woodthorpe Hall* estate under the provisions of the *Settled Land Act*, 1882, had particulars of sale of the property in lots prepared for that purpose, and it was intended that the mansion-house and "excepted" lands, being the premises referred to in the will as coloured blue, brown, and pink, should form part of Lot 1; but owing to the objection of the trustees to give their consent to the sale of that portion of the estate, having regard to the terms of the will, and sect. 15 of the Act, the tenant for life took out this summons under the Act (see Rules of Court under the Act, rule 2), asking that he might be authorized to sell the mansion-house and excepted lands, with a reservation of the mines.

In his affidavit in support of the summons the tenant for life stated that since the death of his father he had never permanently resided at *Woodthorpe Hall*, or on any part of the estate, owing to ill-health and to his having taken up his residence in the south of *England;* also that he had been advised that, owing to the proximity of the town of *Sheffield*, *Woodthorpe Hall* and the excepted lands would prove a very desirable residence for gentlemen having commercial interests in that town, and that thus the testator's estate would probably be largely benefited if the hall and the excepted lands were now realised and the proceeds

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invested, a course which would be in every way more advantageous than letting the hall remain unoccupied: also that to prohibit the present sale of the mansion and excepted lands would be found highly detrimental to any advantageous realization of the whole estate, of which the hall and excepted lands formed the natural centre and kernel, so as to be almost an essential feature in any satisfactory sale of the property. The land surveyor and auctioneer who had prepared the particulars of sale deposed that in his opinion the intended sale would be materially prejudiced if the mansion-house and excepted lands, which were intended to form part of Lot 1, were withdrawn from the sale, inasmuch as they possessed important and attractive residential features which would greatly enhance the selling value of the whole estate; that owing to the proximity of the important manufacturing centre of *Sheffield* he anticipated a large attendance at the sale of persons engaged in commercial enterprise there and anxious to acquire a valuable residence with lands of corresponding extent, and to whom the prospect of acquiring *Woodthorpe Hall* for residential purposes would form the chief attraction; that he did not think it would be for the benefit of the testator's estate if the sale were restricted to the outlying lands forming the bulk of the estate and excluding *Woodthorpe Hall* and the excepted lands; and that he strongly advised a sale of the whole of the property in the lots and according to the particulars prepared. There was also further evidence to the effect that the mansion-house was a desirable residence only for a person engaged in mining or other business pursuits in the locality.

The tenant for life had several children, but no direction was given in Chambers to serve any one else but the trustees with the summons.

Hemming, Q.C., and *Ingpen*, for the tenant for life:—

As to the bulk of the settled estate, there is no doubt that the tenant for life has power under the general provisions of sect. 3 of the *Settled Land Act*, 1882, to sell it without any consent; but sect. 15, which has rendered this application necessary, enacts that, "Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life without the consent of the trustees of the settlement, or an order of the Court." The matter, then, being one for the discretion of the Court, we submit that the evidence is sufficient to justify the Court in making an order authorizing a sale of the property referred to in the summons.

G. Curtis Price, for the trustees:—

We have no objection to the order being made if your Lordship is of opinion that a sale of the mansion-house and excepted lands is proper. There are, however, points arising upon the will and also upon the Act to which the attention of the Court should be directed. In the first place, it is doubtful whether the Court should authorize a sale of a settled estate in the face of distinct and positive directions by the settlor that it shall not be sold. Reading the various clauses of this will it is impossible not to see that the testator was dominated by the desire to keep the mansion-house and the land attached to it intact for his descendants, and he even adopted the unusual course of having a plan of this particular portion of his property indorsed upon his will.

Then, with regard to the Act, sect. 15 contains no *indicia* to guide the discretion of the trustees or of the Court where a tenant for life desires to sell the mansion-house. The tenant for life has power, without any consent, to sell everything but the mansion-house: if then he comes and says, as he does here, "I shall sell all the settled estate but the house, and as it will not fetch a good price without the house, you, the trustees, or the Court, must necessarily consent to a sale of the house also," sect. 15 is virtually struck out of the Act, for in such a case the trustees or the Court are precluded from exercising an untrammelled discretion. It seems open to question, therefore, whether it was the intention of the legislature that the tenant for life should be able to force a consent from the trustees or the Court to a sale of the mansion-house by saying that he could not sell the rest of the property without it.

Possibly the plea of ill-health may be a sufficient reason for

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authorizing a sale of the house, even if the other reasons alleged are insufficient.

Again, the word "demesnes" in sect. 15 would seem to include the garden and grounds immediately about the house, whereas the present summons comprises land of about thirty acres in extent. This might furnish a suitable site for another residence, and it is a question whether it would not be advantageous to defer the sale of, at all events, a considerable portion of it until there should be an increase in the value of building land in the neighbourhood of *Sheffield*.

Then a question arises with regard to the heirlooms. The testator has expressly directed that the heirlooms shall be annexed to and at all times kept in the mansion-house, but there is no application now before the Court for a sale of the heirlooms or for any directions as to their custody; so that if the house is sold the heirlooms will be turned out. Under sect. 37 (sub-sect. 1) the tenant for life can sell heirlooms, but (sub-sect. 3) not without an order of the Court.

[BACON, V.C.:—I will not make an order for a sale of the house without a direction as to what shall be done with the heirlooms, and I must have a description of them.]

Hemming, Q.C.:—The tenant for life is the proper custodian of the heirlooms, but we are willing to amend the summons by asking for a sale of them. We believe there is an inventory.

Price:—The trustees would be perfectly willing to accede to such an application, subject to your Lordship's approval. With regard to both the house and the heirlooms, the trustees are only desirous that the question of a sale should be fully brought to the attention of the Court. Knowing, as they do, what are the express wishes of the testator, they have hesitated to act in the matter on their own responsibility.

BACON, V.C.:—

The trustees in this case have, under the will, a power to sell all but the mansion-house and the excepted lands, which the testator directs shall be kept up as a place of residence. The question is whether it is desirable that this property should now be sold? The reason of the application is very plain. The trustees have no power under the will to sell this property, but the *Settled Land Act*, 1882, comes in and says that the tenant for life shall have power to sell, and thus overrides the will. At the same time, the Act, by requiring the consent of the trustees to an exercise of the power, gives them a discretion as to whether that power shall be exercised or not, but the trustees are at liberty to leave the question to the decision of the Court. In my opinion, the present case is met by the Act of Parliament, and is provided for by express enactment. Of course, in this and in every case I should listen with the greatest attention to what the trustees have to say; but having carefully gone through the affidavits I find from them that the estate will be sold better if the house is sold with it. I also find that the state of health of the tenant for life prevents him from enjoying the residence which the testator has provided for him.

In my opinion, upon the words of the Act of Parliament, the tenant for life has, beyond all doubt, power to sell the house, provided the Court considers the case is one in which he ought to be allowed to exercise that power.

Now reasons are stated before me in favour of a sale of the house, and I do not understand that the trustees present any objection to it. They do what it is their duty to do, namely, take care that the matter does not pass without their being heard, although the Court is at liberty, if it thinks fit, to act without their being heard: however, I have not heard the slightest objection to the expediency of the sale.

The only difficulty arises from the circumstance that the testator, in creating a settlement of all his real estate, annexes a qualification that a particular house and its appurtenances forming part of the estate shall not be sold. But the Act of Parliament says that, whatever the settlement, the tenant for life shall have the right to sell the property settled, but that in the case of the mansion-house he must first obtain either the consent of the trustees or the sanction of the Court. So far as the discretion of the Court is concerned, I have not heard a single suggestion that the proposed mode of selling is not the most beneficial that can be resorted to.

With respect to the heirlooms, I must have the summons amended by including them in the application for a sale. I have a map before me of the land, but I must have a description or catalogue of these heirlooms also. If there is an inventory in existence let that be made the subject of an affidavit. I will now make an order giving the tenant for life authority to sell the mansion-house and lands mentioned in the summons, but the matter is to be mentioned again in the presence of counsel for the trustees after the summons has been amended by including the heirlooms by reference to an inventory.

Hemming :—I presume we need not add any of the children of the tenant for life as Respondents, the interests of the issue being sufficiently represented by the trustees.

BACON, V.C. :—No ; that is unnecessary.

June 27. The summons having been amended, as directed, by asking that the tenant for life might be authorized to sell the heirlooms in or about *Woodthorpe Hall*, again came before his Lordship on an affidavit verifying an inventory of the heirlooms.

Hemming, Q.C., and *Ingpen*, for the summons as so amended, asked that the tenant for life might have liberty to bid at the sale of the heirlooms.

G. Curtis Price, for the trustees, raising no objection to a sale,

His LORDSHIP made an order for the sale of the heirlooms mentioned in the affidavit and inventory, with liberty for the tenant for life to bid at such sale. The costs of both applications to be taxed and paid by the trustees out of the proceeds of the sale of the mansion-house, &c., and heirlooms mentioned in the summons.

Solicitors: *Arnold & Co.; Pilgrim & Phillips*, for *Smith, Smith & Elliott, Sheffield.*

G. I. F. C.

WEST LONDON COMMERCIAL BANK *v.* RELIANCE PERMANENT BUILDING SOCIETY.

V.-C. B.
1884
July 2.

[1883 W. 3174.]

Mortgagor and Mortgagee—Sale by Mortgagor and First Mortgagee—Notice of Second Mortgage—Proceeds of Sale, how to be applied.

A mortgagor of a leasehold house, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage, sold the property. Upon completion, the balance of the purchase-money, after payment of the first mortgagees, was handed to the mortgagor.

In an action by the second mortgagees against the mortgagor (who did not appear) and the first mortgagees:—

Held, that the first mortgagees were liable to the Plaintiffs to the extent of the balance of the purchase-money.

ON the 20th of July, 1865, the Defendant *Henry Pike*, in consideration of £300 paid to him out of the funds of the Defendants, the *Reliance Permanent Building Society*, granted and demised to the society a piece of ground and messuage, numbered 16, *Stanley Street*, in the parish of *St. Luke, Chelsea*, for all the residue of a term of eighty-one years from the 25th of March, 1850, created by a lease dated the 25th of March, 1851, less three days, by way of mortgage for securing the discharge by the mortgagor in some manner authorized by the rules of the society of the sum of £336 5*s.*, being the aggregate amount of the said cash advance and premium, and of all fines, interest, and other sums, if any, which before such discharge might become payable by him to the society. The mortgage contained powers, if three monthly subscriptions should be in arrear and unpaid, or if default should be made by the mortgagor in observance or performance of some agreement, rule, or by-law incorporated therewith, or if the mortgagor should be bankrupt or insolvent, or make some general arrangement with his creditors, of distress and entry, a power to appoint a collector, powers to demise the premises, to complete unfinished buildings, and to repair, powers to insure and pay ground-rent, rates, and taxes, and a power of sale. The surplus proceeds of sale, if any, were to be paid "to the said mortgagor, his executors, administrators, or assigns."

By a deed, dated the 11th of December, 1869, indorsed on the last, and made between the Defendant *Pike* of the one part and the then trustees of the Defendant society of the other part, after reciting that various payments had been made by *Pike*, and that he was entitled to redeem the premises for £189 3*s.* 10*d.*, that the trustees had agreed to make him a further advance of £100 16*s.* 2*d.*, and that *Pike* had agreed to pay a premium of £35 1*s.* upon such advance, it was witnessed that in consideration of the premises and of the sum of £100 16*s.* 2*d.* then paid to *Pike* out of the funds of the society, *Pike* thereby covenanted that the within described premises should be a security to the society for payment of the sum of £325 1*s.* and interest.

By another indenture, dated the 21st of June, 1877, and made between the Defendant *Pike* of the one part and the Defendants the society of the other part, after reciting the two former indentures, and that the society had on the 19th of January, 1875, become incorporated under the *Building Societies Act*, 1874, and that *Pike*, having made several payments to the society, was then entitled to redeem the premises for £107 0*s.* 3*d.*, and that the directors had agreed to make him a further advance of £147 19*s.* 9*d.*, it was witnessed that in consideration of the premises and of the sum of £147 19*s.* 9*d.* paid to *Pike* out of the funds of the society, *Pike* covenanted that the premises should remain a security to the society for the repayment of £255 and interest.

On the 19th of March, 1879, the secretary of the Plaintiffs, a banking company at 34, *Sloane Square*, sent to the secretary of the building society a notice of a charge by the Defendant *Pike* in favour of the bank of the above premises, now called 16, *Ovington Street, Chelsea*, subject to the mortgage to the society, and asking for return of duplicate of notice with acknowledgment of receipt. The duplicate notice was returned to the secretary of the bank; and the fact of receipt of notice was not disputed.

The charge, dated the 19th of March, 1879, was in the form of a letter signed by *Pike* and witnessed, addressed to the bank, and was as follows:—

"In consideration of your having this day discounted my promissory note, dated this day, for £100, and payable four months after date, or of any further or future advances on my account, by way of discount, overdraft, or otherwise, I hereby grant to you as collateral security, by way of equitable mortgage, a lien upon the estate comprised in the title-deeds relating to leasehold premises, No. 16, *Ovington Street, Chelsea, Middlesex,* now in the possession of the trustees of the *Reliance Permanent Building Society,* of 25, *Percy Street, Tottenham Court Road,* to the extent of such present and further or future advances, with interest thereon, after the rate of 10 per cent. per annum, in the event of default, and subject to any mortgage and further charge now existing thereon; and I authorize you to make any payments that may be necessary to prevent a forfeiture or sale of the said estate, if you should think fit, and to charge the same with interest as aforesaid on the said estate; and I undertake when called upon to do so to execute a further agreement, deed, or assurance that may be required by you to give effect to the collateral security hereby granted, at my expense in all things, including stamps and penalty. And in case of a sale by the said *Reliance Permanent Building Society,* I authorize you to receive any surplus there may be and to apply the same in payment of the debt or liability hereby intended to be secured.—*Henry Pike.*"

On the 8th of December, 1882, the general manager of the bank addressed a letter to the secretary of the building society asking to be informed if Mr. *Pike* was keeping up his payments in respect of the leasehold premises No. 16, *Ovington Street,* "now in mortgage to your society, and upon which you will remember that we have a second charge."

In answer, the secretary wrote to say that Mr. *Pike's* instalments had all been paid well, never exceeding three months' arrears.

On the 18th of January, 1883, *Pike* called on Mr. *Roscoe,* of the firm of *Shaen & Roscoe,* solicitors, and told him he proposed to sell his house, whereupon Mr. *Roscoe* gave him the particulars he required, and proceeded to prepare the abstract. In or about March following *Pike* went to a Mr. *Gouldsmith,* an auctioneer, and gave him instructions to sell the house, whereupon Mr. *Gouldsmith* prepared the particulars, in which the seller of the property was described as "the vendor," but in the blank contract at the foot of the particulars, *Pike* was mentioned by name as the seller.

On the 30th of March, 1883, the Defendant *Pike* wrote to the secretary of the building society to say he had instructed a firm of auctioneers to sell his house by auction, and desiring them to "take notice as from that date."

On the same day the Defendant *Pike* also wrote to Messrs. *Shaen & Roscoe,* solicitors, saying he had instructed the auctioneers to sell the house, and adding, "You will please give them what information they may require." He further stated that he had written to the secretary of the building society.

On the 31st of March Messrs. *Shaen & Roscoe* wrote to the secretary of the building society stating as follows:—

"Member is offering the house for sale. Please obtain the deeds and let us have them."

The secretary of the society deposed (in answer to interrogatories) that "in consequence of this application, and not otherwise," "I, on behalf of the society," obtained the deeds from the society's bankers, and took them to Messrs. *Shaen, Roscoe, & Co.*

On the 22nd of May, 1883, the premises were put up for sale by auction at the *Mart, Tokenhouse Yard,* Messrs. *Shaen & Roscoe* being the solicitors conducting the sale, and Colonel *Charles Carew de Morel* became the purchaser for £500.

On the 23rd of June, 1883, the purchase was completed at Messrs. *Shaen & Roscoe's* office. Out of the purchase-money paid by Colonel *Morel,* consisting of £448 3*s.* 10*d.*, being £500 less the £50 deposit, and less certain deductions due to him for ground rent and property tax, amounting to £1 16*s.* 2*d.*, the amount due to the Defendants, the building society, namely, £119 15*s.* 3*d.*, was paid by the solicitors, and the balance, after deducting £7 15*s.* for their costs, namely, £320 13*s.* 7*d.*, was paid to the Defendant *Pike* by a cheque of *Shaen, Roscoe, & Co.* in his favour.

The conveyance, dated the 23rd of June, 1883, was made between *Henry Pike* of the first part, the *Reliance Permanent Building Society* of the second part, and Colonel *Morel* of the third part. It recited the lease, divers mesne assignments, the above deeds of the 20th of July, 1865, the 11th of December, 1869, and the 21st of June, 1877; and that "the said *Henry Pike* hath, with the concurrence of the said society, agreed with the said *Charles Carew de Morel* for the sale to him of the said premises comprised in the said indenture of lease for the residue of the said term thereby granted, free from incumbrances created or occasioned by the said *Henry Pike*, at the price of £500."

It then witnessed that in pursuance of the said agreement, and in consideration of the sum of £119 15*s.* 3*d.*, by the direction of the said *Henry Pike* paid to the said *Reliance Permanent Building Society*, and of the further sum of £380 4*s.* 9*d.* paid to the said *H. Pike* by the said *Charles C. de Morel*, making together the sum of £500, the receipt of which said sum of £119 15*s.* 3*d.* the said society did thereby acknowledge, and the payment and receipt of which two several sums, making together the sum of £500, the said *H. Pike* did thereby admit and acknowledge, the said society "as mortgagees, and by the direction of the said *Henry Pike*, hereby convey, and the said *Henry Pike*, as beneficial owner, hereby conveys and confirms unto the said *C. C. de Morel*," all that piece or parcel of land (describing the parcels) freed and absolutely discharged from all moneys secured by, and all claims and demands of, the said society under or by virtue of their several mortgage securities.

On the 6th of August, 1883, the writ was issued by the bank against the society and *Pike*, and the statement of claim, delivered on the 27th of October, 1883, stated that no notice of the Plaintiffs' charge was given to the purchaser, and that the solicitors of the society acted throughout as the solicitors of both the society and *Pike;* and claimed an account of what was due to them for principal, interest, and costs, in respect of the charge; and payment.

The statement of defence of the Defendants the society, was delivered on the 19th of November, 1883. It stated that the society did not sell in concert with *Pike;* that they executed the conveyance only by the direction of *Pike*, and on being paid the amount of their charge, as a transferring party; that the balance of the purchase-money was paid by the purchaser to *Pike* without any permission on the part of the society being asked or given. They alleged that they had committed no breach of duty towards the Plaintiffs by executing the conveyance; but if they had done so, the Plaintiffs could not be prejudiced thereby, and had no claim against them.

The Defendant *Pike* did not appear.

In answer to interrogatories, *Hoppey*, the secretary of the building society, said that he had verbally informed Mr. *Roscoe* of the nature of Plaintiffs' charge.

At the hearing Mr. *Roscoe* said that he had no written, and, as far as he remembered, no verbal notice of the banking company's charge, and of their notice to the building society, but that if Mr. *Hoppey* said he told him (the witness), he (the witness) would not contradict the statement. If the witness was told, the fact escaped his memory when the abstract and draft conveyance were being prepared and when the purchase was completed.

Hemming, Q.C., and *Neuman*, for the Plaintiffs.

Horton Smith, Q.C., and *Osler*, for the Defendants:—

The assertion of such an equity as this has no authority to support it, and cannot be maintained. The case is one of first impression.

We do not deny the fact of notice, but we say that notice has nothing to do with the case. The authorities shew that an unsatisfied mortgagee, even with notice of a subsequent incumbrance, may transfer the legal estate to any one who will pay him off: *Bates* v. *Johnson* (1). "There are several cases where the purchaser" (*sc.* for valuable consideration without notice) "has been allowed at the last moment, after payment in full and up to decree, to get in an earlier mortgage; and there is no breach of duty in a person assigning his mortgage to anybody who pays him. Any purchaser is entitled to hold that which, without breach of duty, has been conveyed to him": *Carter* v. *Carter* (2), not touched on this point by *Pilcher* v. *Rawlins* (3); *Peacock* v. *Burt* (4); *Coote* on Mortgages (5); *Jarman's* Conveyancing (6).

(1) Joh. 304.
(2) 3 K. & J. 617, 640.
(3) Law Rep. 7 Ch. 259.
(4) 4 L. J. (Ch.) (N.S.) 33.
(5) 3rd Ed. App. p. 569.
(6) 3rd Ed. vol. v. p. 447.

Notice by the Plaintiffs to the society gave them no priority: *Jones* v. *Jones* (1); *Jarman's* Conveyancing (2). A notice given in 1879 is no notice that the Plaintiffs' security was in existence in 1883; and the only effect of it was to prevent us from making further advances. Had we been the vendors it might have bound us as to dealing with the purchase-money.

By the conveyance of the 23rd of June, 1883, we did transfer the legal estate to the purchaser who was paying us off. We received our money, not from *Pike*, but from the purchaser. We conveyed the legal estate, and *Pike* released the equity of redemption to the purchaser, and the purchase-money was paid to *Pike's* solicitors, who, by his direction, paid part of it to us: see sect. 12 of the *Conveyancing Act*, 1882 (45 & 46 Vict. c. 39).

If the Plaintiffs had registered their charge, the purchaser would have discovered it, or would have been affected with notice. They are consequently precluded by their own laches.

The terms of the Plaintiffs' security are too vague to support their contention. Notice, if received, would prevent us from tacking a subsequent charge, but it has no other effect. It is an entire novelty to say that it imposes any duty on a first mortgagee.

Hemming, in reply:—

When a second mortgagee gives notice to a first mortgagee the first mortgagee is not at liberty to reconvey to the mortgagor, or as he shall direct. By creating the second incumbrance he has directed that the conveyance shall be to the second incumbrancer. The statute does but enact the ordinary form of a proviso for redemption. In this instance the first mortgagees have not availed themselves of any special privileges. The argument is based upon a rule about tacking mortgages, founded on the old doctrine of a *tabula in naufragio*, but that is not this case. No authority has been produced to shew that where there has been a sale by a mortgagor with the concurrence of the first mortgagees, the first mortgagees are not bound by the notice of the subsequent mortgage when the distribution of the purchase-money takes place.

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(1) 8 Sim. 633, 642.

(2) 3rd Ed. vol. v. p. 472.

In fact, the rule only applies to a further incumbrancer, not to a mortgagor, or to a purchaser by auction from him.

BACON, V.-C. :—

Nothing is more embarrassing or more disagreeable than to have to decide cases in which there has been no moral delinquency on the part of anybody, but where a loss has been sustained through an irregular course of proceeding and a mistake arising from forgetfulness.

The consequence of what has happened is, that the Plaintiffs, who had a good equitable mortgage—a good second mortgage—on this property, have been deprived of it in consequence of the course which the first mortgagees have thought fit to pursue.

Now what was the condition of the parties? The first mortgagees, holding the legal estate in this property, had a very good security for the sum in which *Pike* was indebted, or should become indebted, to them. The equity of redemption was vested in *Pike*. The mortgagees therefore held his legal right; but they held it subject to the equity of redemption. *Pike* assigns that equity of redemption, inasmuch as, notwithstanding what Mr. *Osler* said to me about the vagueness of this charge, I find a very clear equitable assignment of the equity of redemption in favour of the present Plaintiffs. I read some of the terms of it, and I need not repeat those terms, but it is one of those printed forms which bankers are in the habit of taking from their customers; and the concluding passage in it is—"And in the case of the sale by the *Reliance Permanent Building Society* I authorize you to receive any surplus there may be and to apply the same in payment of the debt or liability hereby intended to be secured." Well, that equitable assignment of the equity of redemption was made and notice of it was given distinctly to the *Reliance Society*. What is the state of things after that? A man who by the original mortgage had acquired a right to redeem has parted with that right to another person, and the first mortgagees have full notice of that transaction. Why some more particular entry of it was not made in some book I do not know. That would have been a more business-like way of proceeding. But it does not stop there, because by that letter of the 8th of December, 1882, which has been read, there was an anxious inquiry made by the second mortgagees as to whether the payments of *Pike* which ought to be made to the society had been duly made, and adding, "Remember that we hold a second mortgage;" the original notice having been given in 1879. It is difficult to understand why men of business have dealt with this subject in this way. There was very clear notice given to the Defendants that the Plaintiffs were the owners of the equity of redemption; and the Plaintiffs were vigilant in looking after their interests; and why, when there was a proposition made by the mortgagor to sell, no notice was given by the Defendants, the *Reliance Society*, to the Plaintiffs, the owners of the equity of redemption, I am at a loss to gather, except that I believe the whole matter was forgotten. However, the fact that a thing was forgotten cannot alter the rights of the parties, and it is quite clear to my mind that, at the time when the sale took place, the society knew that the equity of redemption did not belong to Mr. *Pike*, that if it had been they who were exercising their power they would have been bound to pay the surplus to the owner of the equity of redemption, and that they suffered the money to pass without giving any notice to the person who was entitled to redeem.

It is said this is a case *primæ impressionis*. In my opinion that goes too far. It may well be that this is the first time such a question has been raised, because nobody has ever disputed that an equitable owner of property by giving notice to the person in whose hands the property is (whether by way of pledge or trust, or anything else) acquires a right which cannot be disregarded, which the holder of the property is bound to pay respect to, and not to part with by handing over the money to somebody else, so as to destroy the security which the person who gives the notice has.

The cases which Mr. *Horton Smith* referred to are all cases in which notice was a principal feature; they are all cases in which priorities were determined, but they do not approach the case which is before me. The rules of the society, which were referred to by Mr. *Horton Smith*, cannot have any effect as between the parties to this suit; they are very good rules between the subscribers, but they cannot possibly affect the right which is asserted by the Plaintiffs in this case.

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In my opinion the Plaintiffs have sustained a damage by the negligence which the Defendants have suffered to exist, and I think they are entitled to have the loss they have sustained made good by the Defendants.

The following are minutes of the order:—

Judgment for Plaintiffs.

Take an account of what is due on Plaintiffs' security for principal, interest, and costs, other than the costs of this action, unless the amount is agreed.

Defendants to pay the amount so found due, but, as to the Defendants the Building Society, not exceeding the sum of £320 13*s.* 7*d.*

Defendants to pay the costs of the action.

Solicitors: *G. J. Shaw; Shaen, Roscoe & Co.*

J. B. D.

V.-C. B.
1884
July 7, 8, 19.

In re MARQUESS OF BUTE.
MARQUESS OF BUTE *v.* RYDER.

[1884 B. 190.]

Settled Estates—Tenant for Life—Permanent Improvements—Trusts of Minority Term—Option to Trustees to pay Charges out of Income or Capital—Incidence of Charges paid for out of Income during Minority—Gift of Chattels as Heirlooms under Deed of Entail—Date of Deed left blank—Non-existence of Deed—Non-failure of Gift.

By a deed, executed two years before his will, a testator devised estates in *Glamorganshire*, which comprised a canal, harbour and docks at *Cardiff*, and also estates in the counties of *Bedford*, *Herts*, and *Durham*, to *A.*, *B.*, and *C.*, upon trust out of rents and profits and sums to be raised by sale or mortgage, to pay expenses, salaries, mortgage debts, and the residue to the settlor. He empowered the trustees to enlarge, improve and make additional works at *Cardiff*, and to manage the estates, with powers of leasing, sale and mortgage.

By his will, dated two months before the birth of his first son, the testator devised the *Glamorganshire* estates (except *Cardiff Castle*, park, and lands adjoining) to *B.* and *C.* and their heirs for a term of 1500 years, and subject thereto to the use of his first son for life, remainder to his first and other sons in tail male. The trusts of the 1500 years term were declared to be, after payment out of income of certain annuities, of a specified sum for certain repairs, "by mortgaging or otherwise disposing of

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the term . . . or by, with and out of the rents, issues and profits of the same hereditaments . . . or by one . . . or all of the aforesaid ways and means, or by any other reasonable ways and means" to raise moneys sufficient for the above purposes, and with the moneys to arise from the sale of the estates in *Bedford*, *Herts*, and *Durham*, to satisfy the trusts of such sale. The trustees of the term were empowered to manage and improve the hereditaments comprised in the term in the same manner as the trustees of the deed.

Testator then directed that, during the minority of a tenant for life of the *Glamorganshire* estates, *D.* and *A.* should enter into possession and receipt of the rents and profits of the same hereditaments, and thereout keep down the interest on mortgages, and maintain mansion-houses and grounds, and pay the surplus to the trustees of the 1500 years term for the purposes thereof, and "subject thereto, and after the trusts of the said term of 1500 years shall be fully performed or satisfied" apply any annual sum they might think proper for the maintenance of the minor, and invest the surplus and accumulate the income for his benefit on attaining majority.

The trusts of the proceeds of sale of the *Bedford*, *Herts* and *Durham* estates were declared to be: 1. to pay debts, including mortgage debts on the *Glamorganshire* estates; and 2. to purchase lands to be settled as before.

Six months after the birth of his first son, testator died, and during the minority the trustees of the 1500 years term laid out upwards of £1,000,000 in enlarging and improving the canal, docks, and harbour, and in other works. This sum was largely paid out of income:—

Held, that the expenditure was a charge on the *corpus* of the estates comprised in the term.

Testator bequeathed a collection of books, manuscripts, and pictures to his executors to hold as heirlooms, and suffer the same to be used and enjoyed by the person who for the time being under the limitations of "a certain deed of entail bearing date the day of shall be entitled to the possession of" *M. House.*

At the testator's death there was no such deed of entail as described in the will in existence, and the testator was entitled to the house absolutely in fee simple:—

Held, that the collection belonged to the heir-at-law of the testator, as the person entitled in possession to *M. House.*

BY an indenture dated the 20th of February, 1845, and made between the late Marquess of *Bute* of the one part, and the Hon. *Patrick James Herbert Crichton Stuart*, commonly called Lord *James Stuart*, *Onesiphorus Tyndall Bruce* and *James Munro Macnabb* of the other part, after reciting certain Acts of Parliament whereby the Marquess was empowered to make a ship canal to be called the *Bute Ship Canal*, and also a wet dock or basin at the termination of the said canal near the town of

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Cardiff, and to make and maintain other necessary works therein mentioned, the Marquess granted the said canal, harbour, docks and appurtenances, and also his freehold estates in the counties of *Glamorgan*, *Monmouth*, *Durham*, *Bedford*, and *Herts*, to the use of the said Lord *James Stuart*, *O. T. Bruce*, and *J. M. Macnabb*, their heirs and assigns, upon trust that they and other the trustees or trustee for the time being "do and shall stand seised and possessed of the said hereditaments and premises and of the rents, issues and profits thereof" upon trust, after payment of expenses, salaries and wages, to pay off principal moneys borrowed by or advanced to them upon mortgage for answering the purposes of the present deed, and upon further trust to pay over the residue (if any) of such money to the Marquess. Powers were given to the trustees to bring and defend actions, to settle accounts, to provide additional wharfs, docks and works, to manage, improve, maintain and collect the rents, issues and profits of the harbour and of the lands and hereditaments thereby granted, to carry on negotiations with railway companies, to commence and discontinue actions, and to do and perform all acts as fully as the Marquess or other owner of the canal, harbour, docks and appurtenances, was authorized and empowered to do. The deed contained powers of leasing, sale and mortgage; and subject to the trusts thereinbefore declared, the trustees were to stand seised of the hereditaments, and possessed of the surplus moneys in trust for the Marquess absolutely.

On the 22nd of July, 1847, the late Marquess of *Bute* made his will, and thereby, after certain specific bequests, and after bequeathing certain furniture, pictures, and other articles to go as heirlooms with *Dumfries House* in *Scotland*, and *Cardiff Castle* respectively, the testator gave and bequeathed to his executors all the books, manuscripts, and pictures then lately in and about his mansion-house at *Luton*, and called the *Luton Collection*, "upon trust to hold the same as heirlooms from time to time so long as the rules of law or equity will allow, and to permit and suffer the same from time to time to be used and enjoyed by the person or persons who for the time being, under the limitations and dispositions made by a certain deed of entail bearing date the day of , shall be entitled to the possession or to the receipt of the rents and profits of my capital messuage or mansion-house called *Mount Stuart House*, in the *Isle of Bute*, in that part of the *United Kingdom* called *Scotland*." Testator then directed an inventory to be taken of the books, manuscripts, and pictures comprised in the last-mentioned bequest, and that two copies should be made of the same, one copy to be signed by the executors, and the other "by the person or persons who for the time being shall be entitled to the possession or to the receipt of the rents and profits of my said capital messuage or mansion-house called *Mount Stuart House* aforesaid;" the copy signed by the executors to be kept "at the said mansion-house," and the other to be retained by the executors.

Testator then, after reciting that it was his intention to enlarge and improve *Mount Stuart House*, and to expend the sum of about £25,000 in such enlargements and improvements, declared that in the event of the same not being completed at his death, his executors should proceed with all convenient speed to complete the same.

Testator bequeathed the residue of his personal estate to his executors upon trust to convert the same into money, and to apply the proceeds thereof, in the first place, in payment of the several debts to which the clear proceeds of the sale of his estates in the counties of *Hertford*, *Bedford*, and *Durham* were thereinafter made applicable, according to the order and priority thereinafter declared, but not including in such application of his personal estate the purchase of lands in *Scotland*, and subject as aforesaid to pay any residue to testator's brother, Lord *James Stuart*.

The testator then devised all his real hereditaments in the counties of *Bedford*, *Hertford*, *Durham*, and *Glamorgan*, in trust as to his estates in the counties of *Bedford*, *Hertford*, and *Durham*, to the use of Lord *James Stuart*, *O. T. Bruce*, and *J. M. Macnabb*, their heirs and assigns, upon the trusts thereinafter declared; and as to his estates in the county of *Glamorgan*, to the use of the said *O. T. Bruce* and *J. M. Macnabb* (other than and except his capital messuage or mansion-house called *Cardiff Castle*, park, and gardens, and *Cathays Park* adjoining), for the term of 1500 years, without impeachment of waste, upon the trusts thereinafter declared; and as to *Cardiff Castle* and *Cathays Park*, and also the hereditaments comprised in the 1500 years' term, after the determination thereof, to the use of each son of his body for life, without impeachment of waste, remainder to his first son and other sons in tail male, with remainders over.

Testator then declared the trusts of the 1500 years' term to be that the said trustees "do and shall by, with, and out of the rents, issues, and profits of the hereditaments comprised in the said term of 1500 years, pay at the times and in the manner hereinbefore appointed for payment thereof respectively the several annuities or yearly sums of money hereinbefore bequeathed," and also pay to his executors such sums as under the directions thereinbefore contained they should have expended or incurred in enlarging and improving *Mount Stuart House;* and upon further trust that the trustees "do and shall, with all convenient speed after my decease, " by mortgaging or otherwise disposing of the hereditaments comprised in the said term of 1500 years or any of them, or any part thereof, for the whole or any part of the same term, *or by, with, or out of the rents, issues, and profits* of the same hereditaments or any of them, or by bringing actions against the tenants or occupiers of the same premises or any of them for the rents then in arrear, *or by one, or more than one, or by all of the aforesaid ways and means*, or by any other reasonable ways or means, levy and raise, not only sufficient sums of money for the purposes aforesaid, but also such further sums of money as shall be sufficient, in connection with the moneys to be raised by the sale of my estates in the said counties of *Bedford, Hertford*, and *Durham*, under the trusts herein declared thereof, to discharge the several debts hereinafter directed to be paid out of the proceeds of my said estates in the counties of *Bedford, Hertford*, and *Durham*, and to make the several purchases in the neighbourhood of *Cardiff Castle*, and to leave the clear sum of £300,000 to be applied in the purchase of real estates of inheritance in *Scotland*, in manner hereinafter directed to be done with the moneys to arise from the sale of the said estates in the counties of *Bedford, Hertford*, and *Durham;*" and pay over the moneys to be raised for all or any of the purposes aforesaid to the persons or trustees under the will or otherwise entitled to receive and be paid, or directed to lay out and invest, the respective sums of money aforesaid.

Testator declared that it should be lawful for the trustees of the term of 1500 years "from time to time, and at all times during the continuance of the trusts of the same term" to grant any leases of any of the hereditaments comprised in the term, "and generally to manage, improve, and superintend the same, and to deal and contract with the owners of adjoining or neighbouring estates, railways, canals and works on the same terms, and with the same powers and authorities, as the trustees of a certain indenture executed by me on the 20th day of February, 1845, and hereinafter referred to, are thereby authorized during my life to grant leases of the hereditaments comprised in the said term of 1500 years, and to manage, superintend, and improve the same, and to deal and contract with such owners as aforesaid."

Testator further declared that it should be lawful for the trustees of the same term "by all or any of the ways and means aforesaid, to raise any further sum or sums of money beyond those hereinbefore authorized to be raised for the discharge of all or any of the powers lastly hereinbefore given, and for that purpose to postpone, if necessary, the raising money for the other trusts of the said term which may from time to time not have been discharged."

The testator further declared that during the minority of any tenant for life in possession of the *Glamorganshire* estates, *John Chetwynd Talbot* and the said Lord *James Stuart* "do and shall enter into possession or receipt of the rents, issues and profits" of the same hereditaments and premises, and should during such minority "hold and continue such possession or receipt of rents, issues, and profits, and manage or superintend the management of the same hereditaments and premises, with power to fell timber from time to time in the usual course, and from time to time during such minority . . . *by, with, and out of the rents, issues, and profits* of the same hereditaments and premises, including the produce of the sale of timber (after deducting the expenses of management), pay and keep down any annual sum or sums of money which may be charged upon the same hereditaments and premises, or any part or parts thereof respectively, and the

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interest of any principal sum or sums which may be charged by way of mortgage or otherwise upon the same premises or any part or parts thereof, or so much and such part of such annual sums and interest as shall not be provided to be paid under the trusts of the said term of 1500 years," and keep up and insure the mansion-houses and grounds:

"And subject thereto do and shall from time to time until the trusts and purposes hereinbefore declared of the said term of 1500 years shall be fully performed or satisfied, or become incapable of effect, pay the surplus or residue of such rents, issues and profits, after providing for the several purposes aforesaid, unto the trustees or trustee for the time being of the said term of 1500 years, to be by them and him held and applied upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisions, and declarations as are hereinbefore declared or contained of or concerning the rents, issues, and profits of the hereditaments comprised in the said term of 1500 years: And subject thereto and after the trusts of the said term of 1500 years shall be fully performed or satisfied, or become incapable of effect, do and shall apply any annual sum or sums of money which they or he shall think proper according to the age of such minor for the maintenance and education of such minor: And subject thereto shall from time to time pay and invest the surplus or residue of such rents, issues, and profits, after providing for the several purposes aforesaid, in the names of" the trustees "in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of *Great Britain*, or at interest upon Government or real securities in *England* or *Wales*, but not in *Ireland*, to be altered or varied from time to time as to them or him shall seem meet; and do and shall receive the interest, dividends, and annual produce of the said stocks, funds, and securities, and lay out and invest the same in their or his names or name in the purchase of or upon stocks, funds, or securities of a like nature, to be also from time to time altered or varied as to them or him shall seem meet; and do and shall from time to time repeat such layings out and investments, so that the said rents, issues and profits, stocks, funds, securities, interest, dividends, and annual produce,

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and all the resulting income and produce of the same, may during such minority, or minority and discoverture as aforesaid, be accumulated in the way of compound interest."

Testator then declared that the trustees "shall stand and be possessed of and interested in such rents, issues, and profits, stocks, funds, and securities, interest, dividends, and annual produce and the accumulations thereof, Upon trust at the end of each such minority . . . as aforesaid to pay, transfer, or assign the same to" the tenant for life who being a male should attain twenty-one; but if the tenant for life during whose minority such rents, issues, and profits might have accumulated as aforesaid, being a male, should die under the age of twenty-one years, then

"Upon trust upon the decease of each such person to convert the same accumulated fund into money, and lay out or invest the money arising thereby in the purchase of freehold or copyhold estates of inheritance, to be situate somewhere in the said county of *Glamorgan*, and to settle and assure, or cause to be settled and assured, the estates and hereditaments so to be purchased, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations (including this present proviso if and so far as the same shall be applicable) in and by this my will limited, expressed and contained of and concerning the hereditaments comprised in the said term of 1500 years hereinbefore limited, or such of the same uses, trusts, intents, purposes, powers, provisoes and declarations as shall be then subsisting or capable of taking effect."

The testator declared that the estates in the counties of *Bedford*, *Herts*, and *Durham*, limited to the use of Lord *James Stuart*, *O. T. Bruce*, and *James M. Macnabb* and their heirs, were so limited to them upon trust for sale, and to apply the proceeds, after deducting costs and expenses, in the first place, in the payment, according to their respective priorities as next thereinafter mentioned, so far as the testator's residuary personal estate should be insufficient for the purpose, of the testator's debts, that was to say: 1. Sums due to banks in *England* or *Scotland*; 2. Bond debts; 3. Mortgage debts on the testator's estates in the counties of *Bedford* and *Herts*; 4. All the mortgage debts charged on the testator's several estates in the counties of *Glamorgan* and *Durham*; and in the second place, in the purchase of hereditaments adjoining to, or convenient to be held with, *Cardiff Castle*, to an amount not exceeding £3000; and thirdly, of hereditaments in *Scotland*, to be settled (in the events which had happened) on the Marquess's first son for life, without impeachment of waste, remainder to the first and other sons of his first son in tail male, with remainder over.

The testator appointed Lord *James Stuart*, *O. T. Bruce*, and *J. M. Macnabb* executors of his will.

About two months after the date of the will, namely, on the 12th of September, 1847, the testator's only child, the present Marquess, was born.

The testator died on the 18th of March, 1848.

On the 12th of September, 1868, the present Marquess attained twenty-one, and on the 16th of April, 1872, he married, and now had issue three children, of whom the eldest, the Earl of *Dumfries*, was now about three years old.

The present action was commenced by writ, issued on the 10th of January, 1884, by the present Marquess of *Bute*, against the Hon. *Henry Dudley Ryder* and two other persons, as the present trustees of the will, and also trustees of the term of 1500 years (the trustees originally appointed having long since died), and the Earl of *Dumfries*.

The statement of claim alleged that the residuary personal estate of the testator was insufficient for the payment of the debts to which the proceeds of the sale of the *Hertfordshire*, *Bedfordshire*, and *Durham* estates were made applicable, and would be so insufficient even if the *Luton* collection formed part of the residue.

It then stated that by the *Bute Docks Act*, 1866, the trustees of the term of 1500 years were empowered to make additional improvements for the purposes of the *Bute Docks* at *Cardiff*, part of the *Glamorganshire* estates.

Also that the trustees of the 1500 years term had received the rents and profits of the estates comprised in the term, and had thereout paid and kept down the annuities given by the will; that the mortgage and other debts directed by the will to be paid had been discharged, except a mortgage of £186,968 on the *Glamorganshire* estates, and the trustees had laid out more than £3000 in the purchase of estates in *Glamorganshire*, near *Cardiff Castle.*

Further that the trustees of the term of 1500 years had, during the minority of the Plaintiff, and afterwards, under the powers of the will and the trust deed of the 20th of February, 1845, expended very large sums of money, amounting to more than £1,000,000 sterling, in the construction and improvement of the wharves, docks, and piers in connection with the *Bute* canal and docks at *Cardiff*, including the purchase of land at or near *Cardiff* required for the purposes of the works, and that the works and improvements had to a large extent been paid for "out of the income" of the *Glamorganshire* estates, partly during the minority of the Plaintiff, and partly after he had attained twenty-one.

The claim then stated that the trustees of the term declined to determine whether the amount so expended as capital, works, and purchase of land ought to be considered a charge on the *corpus* of the settled estates, or ought to be paid wholly out of income; and the Plaintiff submitted that the same ought to be borne by the *corpus*, and that he was entitled to a charge on the estates for the expenditure paid out of income during his minority.

The claim then proceeded to state that no deed of entail of, or affecting the testator's mansion-house called *Mount Stuart House*, was in existence at the testator's death, or at the date of his will; that the testator was absolutely entitled to the said mansion-house; and that on his death the Plaintiff became and still was absolutely entitled to the same as the testator's heir-at-law.

The claim stated that, doubts being entertained whether the bequest had not failed by reason of there being no such entail in existence, the Plaintiff submitted that according to the true construction of the will he was entitled to the chattels forming the *Luton Collection*, as the person entitled to the possession or receipts of the rents and profits of *Mount Stuart House.*

The Plaintiff claimed to have the following questions decided:

1. "Whether the moneys expended out of income of the *Glamorganshire* estates received during the Plaintiff's minority by the trustees of the said term of 1500 years . . . . in con-

structing and enlarging docks and other permanent works and improvements (including the purchase of land at or near *Cardiff*) for the benefit of such part of the settled estates in the county of *Glamorgan* devised by the said will as are comprised in the said term of years ought, as between the Plaintiff and the persons entitled to the inheritance of the settled estates, to be a charge upon the *corpus* of such part of the said testator's *Glamorganshire* estates as are comprised in the term of 1500 years, or ought to be borne wholly by income:" and

2. "To whom by virtue of the said will the books, manuscripts, and pictures known as the *Luton Collection* belonged."

[From the evidence it appeared that the actual expenditure from the 18th of March, 1848, to the 12th of September, 1868, was £1,222,970 5*s.* 9*d.*; but this amount included interest on the outlay at 4½ per cent., whilst the docks were being constructed—that being considered a proper charge against capital. The amount so charged was £170,546 3*s.* 6*d.*; and this sum the Plaintiff offered to pay, *i.e.*, he did not seek to include it in the amount of his charge.]

Davey, Q.C., and *Vaughan Hawkins*, for the Plaintiff:—

The trustees of the deed of the 20th of February, 1845, having been empowered to enlarge and improve the canal, docks, and harbour at *Cardiff*, the testator by his will declares the trusts of the 1500 years to be first out of the rents and profits of the hereditaments comprised in the term, to pay annuities and certain expenses, and then, *either* by sale or mortgage of the term, *or* out of the rents and profits, to raise sufficient money for the above purposes, and to form a fund sufficient for the purposes after-declared respecting the proceeds of sale of the *Bedford*, *Hertford*, and *Durham* estates.

He then enables the trustees of the term to exercise the same powers as are declared by the trust deed; and as the purposes of this deed are all capital purposes, there is nothing thus far to induce the Court to hold otherwise than the law holds with regard to the incidence of the charges. No doubt the trustees are empowered to raise the money *either* by sale or mortgage, *or* out of rents and profits, but, because two alternatives are given, it is not to be supposed that the testator meant the ultimate incidence of the charges to depend on chance.

Then comes the minority clause, whereby the minority trustees are empowered to take the rents and profits during minority, and out of them to keep down annual payments, and then pay over the surplus to the trustees of the 1500 years' term; and after the trusts of the term are satisfied, to provide for the maintenance of the minor, and to accumulate the surplus for his benefit on attaining majority.

The proceeds of sale of the *Bedford*, *Herts*, and *Durham* estates are to be applied: 1. In payment of debts, including mortgage debts on the *Glamorganshire* estates; 2. In the purchase, to the extent of £3000, of lands near *Cardiff Castle*; 3. Of lands in *Scotland*, to be limited as the other real estates are limited to the testator's first son for life, with remainder over.

The trustees of the term having made this great expenditure, to a large extent out of income, it is understood that as to the outlay since majority no question is raised. It is only from the terms of the minority clause that any difference can be supposed to exist in the state of things before and after the attainment of majority; and it is, in fact, upon the terms of the minority clause, that the other side contend that the minority income must bear this charge to the detriment of the accumulations fund.

But if this contention be right, the minority trustees were bound to go on paying the whole of the rents during the minority to the trustees of the term for the purposes of the term, whether annual or permanent, until all those purposes were exhausted. If so, how and whence was the tenant for life to get his maintenance? This consideration shews that something much more distinct than occurs here is necessary in order to alter the legal incidence of these charges.

The general rule is thus expressed in *Jarman* on Wills (1): "Where the direction is to raise out of the rents and profits, *or* by sale or mortgage, it is obvious that these words (being evidently used in contradistinction) cannot mean the same thing; rents and profits, therefore, must import annual rents and profits; and if, in such a case, the charges to be raised by these respective modes are of two kinds, one annual, and the other in gross, the words will be distributed, the annual charges being raisable out of the annual rents, and the sums in gross by sale or mortgage."

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(1) 4th Ed. vol. ii. p. 615.

In *Marker* v. *Kekewich* (1) the trusts of the term were, by cutting and selling timber, *or* by demising, mortgaging, or selling the premises, *or by all or any of the said ways and means*, or any other reasonable ways and means to raise £30,000; and, it was held, as between tenants for life not impeachable for waste and remaindermen, that the *corpus* of the estate must bear the charge, the tenant for life keeping down the interest upon it. The view of *Wigram*, V.-C., is stated with great clearness and decision (2). A similar rule prevails with regard to the proportion in which the fines and expenses of renewal of leases are to be borne by successive owners: *Jones* v. *Jones* (3).

It is to be borne in mind that the money in question is money which was at the disposal of the trustees of the 1500 years term, not of the minority trustees.

As to the *Luton Collection*. It appears that the late Marquess had executed a deed of entail of *Mount Stuart House*, in the *Scotch* form, but had revoked it two years before the date of his will. We contend that the collection belongs to the owner of *Mount Stuart House*. If not, it must be sold (*i.e.*, purchased by the present Marquess) and the proceeds must go to the trustees of the 1500 years term.

Vaughan Hawkins:—

The revoked deed has been sought for, and cannot be found; but the draft has been found. If the deed had been in existence it would have carried *Mount Stuart House* to the Plaintiff, so that *quâcunque viâ* the collection must be his.

As to the first point—had the amount not been so large, no one would have raised the question. We rely on the general rule of the Court, depending on the principle that the benefits of property and the burdens upon it are to go together: *Wilson* v. *Spencer* in 1732 (4); *Revel* v. *Watkinson* in 1748 (5).

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(1) 8 Hare, 291.

(2) Ibid. 298, 299.

(3) 5 Hare, 440.

(4) 3 P. Wms. 172.

(5) 1 Ves. sen. 93.

On the second point; in *Illingworth* v. *Cooke* (1) there was a gift to a class, with an exception which was imperfectly worded, and the gift to the class was established, unaffected by the exception.

Stirling, for the trustees of the term.

The *Solicitor-General* (*Sir F. Herschell*) and *H. Burton Buckley* for the Earl of *Dumfries*:—

It is important to bear in mind the exact nature of the question. We are not here dealing with the question of how the trustees of the term are to execute the discretion given to them; nor with the question whether the minority trustees have, during the minority, been exceeding their discretion in such a way as not to leave enough for the maintenance and education of the minor. Here the trustees of the term have duly exercised the powers given to them by the will; no fault is found with what they have done; and what the Court is asked to say is, that these powers having been thus exercised, the law necessarily creates a charge for the benefit of the tenant for life. There may be such a rule of law; if it exists, it is an arbitrary rule which Courts have laid down in the absence of direction or of discretion given by the settlor. No authority has been produced to say that the law creates a charge where the testator has given a discretionary power: that is the proposition which the Plaintiff has to make out.

It would have been open to the testator to provide that where moneys are to be raised out of income, there should be such a charge, but no such provision is to be found in this will. On the other hand, it may be that he has given the trustees power to raise moneys out of the surplus income. The question is whether that is not what he has done. We say that he has in terms given them this power, and that he has nowhere said it shall be a charge on the *corpus* of the estates.

If the Plaintiff's contention is right, when did these moneys become a charge? Did each sum become a charge from time to time directly it was laid out? Is the supposed rule of law to prevail over the intention? The testator may have thought a long minority probable, and may have desired to relieve the inheritance at the expense of the minority income.

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(1) 9 Hare, 37.

It has been said, if the trustees had exercised their powers of taking these sums out of income, they might have deprived the minor of his maintenance. Had they done so, the Court would have interfered. In fact nothing of the kind was done.

The judgment of the Court in *Jones* v. *Jones* (1), seems to shew that at that time there was no settled rule; and that was not a case raising the question of what was to be done where the trustees had already exercised their discretion; the trustees had not taken upon themselves to act.

The passage relied upon from *Marker* v. *Kekewich* (2) was a *dictum* of Vice-Chancellor *Wigram*, also pronounced upon an application made to him prior to any action on the part of the trustees.

Wilson v. *Spencer* (3) turned upon special words in a will, and does not seem to throw much light on the question.

Then as to the *Luton Collection*. The intention clearly was to settle these objects and make them heirlooms. It would have been very obvious to give them to the owner of *Mount Stuart House*, if the testator had intended this. That would have been to give them to the Plaintiff absolutely. But that is not what the testator did. He meant them to be used by successive owners. It is said that there is no such deed of entail as mentioned. The effect of that is that the gift fails, and the property falls into the residue. In either view of the case, they cannot now be held as heirlooms; but the obvious intention was that they should be so held; the intention fails, and the property becomes part of the residuary personal estate.

Buckley:—

The outlay upon *Cardiff Docks* is not *simpliciter* a question between tenant for life and remainderman. Accumulations of surplus income are to be for the benefit of the minor after attaining majority. What the testator desired was that the owners, both tenant for life and remainderman, should have an unencumbered estate. His wish was to clear the estate.

(1) 5 Hare, 440.
(2) 8 Hare, 291, 298.
(3) 3 P. Wms. 172.

The direction to pay mortgages applied only to mortgages existing at the testator's death. He did not wish the trustees to create new mortgages.

The cases cited apply simply to questions between tenant for life and remainderman, not to questions of accumulations during minority.

As to the alleged general rule, if every time £1000 were laid out it became instantly a charge, questions would arise between chargees and subsequent mortgagees. Would subsequent mortgages have to be postponed? How would it be possible to go into the market and raise money on mortgage? The powers are alternative; the trustees have done what it was their duty to do; and the incidence is fixed. In *Playters* v. *Abbott* (1), the Master of the Rolls expressly guards himself; "Where," he says, "a testator having the same purpose, expressly provides a fund for such payments, the question no longer depends upon general principles of equity."

Davey, in reply:—

If the option of the trustees during the minority is to prevail over the general rule of the Court, how is it that the expenditure since the majority of the tenant for life, is admitted by the trustees to be a charge on the inheritance? The incidence, before and after majority, must be the same. If the charges during minority cannot be adjusted, neither can the charges after minority.

That there does exist a general rule of the Court appears, from, amongst other authorities, *Lewin* on Trustees (2). The language is that of an ordinary portions term, as to which it was never heard that a tenant for life could not come for adjustment.

The minority trustees are different from the trustees of the term. The object of this was to provide for such purposes as were paramount to, and not provided for by, the trusts of the term. Amongst these paramount objects was the maintenance of the minor.

The right to a charge, that is to say, the right of the tenant for life to have an adjustment of accounts arises directly the payment is made. If a tenant for life pays off a mortgage, he gets a charge immediately.

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(1) 2 My. & K. 97, 109.

(2) 4th Ed. p. 275.

The Plaintiff's argument has been represented as if the Plaintiff were claiming the whole of the expenditure as accumulations. The Plaintiff does not contend for this. He admits he would have to keep down the interest on the charges. He will not, therefore, claim in account what would have been due from him by way of interest.

As to the *Luton Collection*, the Court will conclude that the intention of the testator was, that the owner of *Mount Stuart House*, whether absolute or limited, should have the collection.

July 19. BACON, V.C.:—

The questions now presented for decision arise upon the will of a former Marquess of *Bute*, who died in March, 1848, leaving an only child, the present Plaintiff, then an infant. The Plaintiff is the tenant for life in possession of the estates of the late Marquess, as they are entailed and settled under his will.

The questions, which are two only, relate to and depend upon the construction of the will. They are each of them of some difficulty, and one of them involves a pecuniary interest of very large amount. In order to approach the consideration of them it appears to be necessary to consider carefully the circumstances under which the testamentary dispositions were made, and the subjects to which they relate. The testator was a person of great wealth, and possessed of estates of large value, situate in *Scotland*, in several counties in *England* and *Wales*, and, what more particularly concerns the present inquiry, an extensive property in *Glamorganshire*, comprising the port and harbour of *Cardiff* and the ship canal and other works connected with them. [His Lordship then stated the effect of the deed of the 20th of February, 1845, and continued:—] By the will of the late Marquess, dated the 22nd of July, 1847, he made certain specific and other bequests, and provided for the payment of his mortgage and other debts, and gave other directions concerning his estate, none of which for the present purpose it is necessary to state particularly, with one exception, as to the *Luton* heirlooms, which I will hereafter refer to. But the main features of the will and those which relate directly to the more important of the present questions are, that he created a term of 1500 years, subject to which his estates are devised in strict settlement, under which the Plaintiff, the present Marquess of *Bute*, is tenant for life in possession, without impeachment of waste, with remainder to his first and other sons in tail male. It is unnecessary, in the events which have happened, to state all the purposes to which the powers given to the trustees of the term were to be applied, or to do more than to quote the provisions relating to the *Bute Canal* and the docks at *Cardiff*, which are in these terms. [His Lordship read the powers of leasing, improvement, and management from the will, by reference to the deed of the 20th of February, 1845, as printed above, and continued:—] The testator then provided for the event of the persons entitled under the will being under the age of twenty-one, thus: [His Lordship read the minority clauses as set out above, and continued:]—It appears, therefore, beyond doubt that the purpose and intention of the testator was that the works he had engaged in should be carried on and completed, nor can it be doubted that he expected and believed (an expectation which, as it now appears, has been fully realised) that upon the foundation he had thus laid, a large augmentation would be made to the princely fortune of which he was possessed, and that to the accomplishment of this object the whole of his wealth and possessions should in the first instance be devoted. To this end he appointed trustees, in whom he reposed unlimited confidence, and upon whom he conferred the almost unlimited power expressed. He meant also to provide for the transmission of the wealth thus augmented to the person who under the limitations of his will should succeed to the rank and dignity of which he was possessed, and with a direct view to such succession he provided, by the clauses I have referred to, for the accumulation of the income to which successive tenants for life in possession of his estates might become entitled. Considering his station and the amount of his wealth, it cannot be imputed to him that he did not contemplate the propriety, almost the necessity, of providing abundantly for the maintenance and education of his infant successors in the manner most suitable for their condition in life, during such minorities, or that he was indifferent or unmindful of the expediency of providing by means of the accumulations, that upon the termination of the minorities, the tenants for life should not find themselves the present penniless owners of the settled estates; and yet that might be the result if the trustees were enabled to employ and for ever to withdraw the entire amount of the accumulations.

The testator died in March, 1848, without having altered his will, so far as it has been stated, leaving the Plaintiff, the present Marquess, his only child, who did not attain the age of twenty-one until September, 1868. During the whole of his minority and subsequently, the trustees continued to exercise the powers vested in them in the constructions and improvements mentioned in the will and the trust deed, and further authorized in the *Bute Docks Act*, passed in 1866, by which additional improvements and permanent works have become part of the *Bute Canal* and *Dock* at *Cardiff*, and, therefore, have become part of and are comprised in the trusts of the settled estates. The expenditure on these works has been of very large amount, exceeding, it is said, more than a million sterling. The trustees have not exercised the powers conferred upon them by the will to raise the moneys thus expended, but have applied the income of the *Glamorganshire* estates to that purpose, as well before as after the Plaintiff had attained the age of twenty-one years. The amount which has been expended after the Plaintiff attained twenty-one has been ascertained to amount to £175,094 3*s.* 7*d.*, and for that sum the trustees have given the Plaintiff a charge on the estate. The question now to be determined relates to the accumulations of income during the minority of the Plaintiff, who submits that "the whole of the expenditure has been for the increase and benefit of the inheritance of the settled estates, and that as between the Plaintiff and those entitled in remainder the same ought to be borne by the *corpus* of the estates, and that the Plaintiff is entitled to a charge on the estates for the amount so paid out of income during his minority."

The trustees of the term, on the other hand, "decline to determine whether the amount similarly expended on capital works, and purchase of land as aforesaid out of income of the *Glamorganshire* estates, received during the minority of the Plaintiff, ought to be considered a charge on the *corpus* of the settled estates, or ought to be paid wholly out of income."

For the solution of this question the present action has been brought; the Earl of *Dumfries*, the eldest infant son of the Plaintiff, being made a Defendant as representing, for the purposes of this action, all persons entitled in remainder after the Plaintiff's life interest to the said settled estates, including those who may be or become entitled to jointure rent-charges or to portions charged thereon under the testator's will. No questions are raised relating to the administration of the late Marquess's estate, nor to any of the subjects of his will.

The case has been argued at great length, with the utmost care and deliberation—I need not say with consummate ability—by the learned counsel on both sides. The first question is one not only of some novelty as to the circumstances attending it, but of great importance as to the amount depending upon it, and of still greater importance and nicety, inasmuch as it appeals to the principles upon which Courts of Equity deal with such subjects.

In the construction of wills the sole object of the law is to pay implicit respect to the intention of testators, so far as that intention can be satisfactorily ascertained by the true interpretation of the words by which that intention is found to be expressed. But the will is, nevertheless, in all cases to be interpreted with regard to its whole scope and tenor, and the circumstances, so far as they are indicated by the words the testator has used, but not travelling beyond them. The nature and object of the gift or disposition, and the character of the donee, are also not to be disregarded. Many cases have occurred, some of which have been referred to in the arguments, in which the respective rights of tenants for life and the persons entitled in remainder have been considered by the Court. In the cases in which the subject of the interests has consisted of transient or waning or wasting property, but which may be capable of support or restoration by the expenditure of money, (as in the cases of leaseholds renewable, and as to copyholds on successive admissions by payment of fines,) the Court has endeavoured to do justice to the several parties by apportioning the burthen between the persons entitled successively to the enjoyment. The task has, no doubt, been at all times difficult, but it has been accomplished upon principles of sense and justice and right reasoning. None of the cases mentioned—nor have I been able to find any—can properly be said to be directly in point, because (among other reasons) they relate to the preservation of actual and existing subjects, while the present case relates to the acquisition of new and additional property. They do, however, in my judgment, recognise and establish principles and general rules, which must govern all cases.

In *Playters* v. *Abbott* (1) wherein reference was made to several leading cases, the Master of the Rolls (Sir *John Leach*) states the rule thus (2): "Where a testator indicates an intention that fines on the admission to copyholds, and on the renewal of leases, should from time to time be paid, in order to maintain a permanent interest in the property for the benefit of those to whom he has successively limited his fee-simple estates, and has not described the fund out of which such payment should be made, the general principles of equity require, and the course of authority has settled, that the tenant for life and those in remainder shall bear the burthen of those payments in the proportion of the benefits which they actually derive from such admissions or renewals;" thus adopting the rule in *Buckeridge* v. *Ingram* (3), which had been cited in the argument there.

In *Jones* v. *Jones* (4) Sir *J. Wigram* speaks (5) of "the general rule" governing such cases, and says that "a case in which the trustees have power to raise the fines in any way, but have thrown on the Court the execution of the trust, is a case in which the Court will pursue its own general rules." A question arose there as to apportioning the burthen between the several interests which is not raised in the present case. The Vice-Chancellor's judgment is thus expressed (6)—"Where however—the trustees not acting under the power—the Court is called upon to exercise a discretion, the effect of which, in one way, would be to throw the burden upon one party, and, if the discretion be exercised another way, to throw it upon a different party, and there is no reason for adopting one mode rather than the other, there the equitable rule would appear to be not to throw the burden more upon one party than upon the other, but to apportion it between them."

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(1) 2 My. & K. 97.
(2) Ibid. 108.
(3) 2 Ves. jun. 652.
(4) 5 Hare, 440.
(5) Ibid. 464.
(6) Ibid. 462.

In *Marker* v. *Kekewich* (1), the same Judge, acting upon the same general rule, observes (2): "It was said for some of the demurring parties, that the trustees had an unlimited discretion to raise the charges in such way as they thought fit; and that, if their discretion were but honestly exercised, the Court would leave the charges to be finally borne by those parties upon whom the mere act of the trustees might chance to throw it. . . . If the argument were right, the trustees, by postponing the raising of the charges until after the death of the tenant for life, might throw the whole burden of principal and interest on the inheritance; or, by entering into possession of the estates in the first instance, and collecting the rents and profits, including the timber which the tenant for life *sans* waste might cut, they might deprive the tenant for life of all benefit under the settlement . . . It follows, that, as between the tenant for life and the remainderman, the tenant for life must pay the interest of the charges, and the *corpus* of the estate must bear the charges upon it."

Now, having regard to the general rule thus recognised and acted upon, and deriving such assistance as I may gather from the cases between tenants for life and remaindermen, I am led to consider the construction and effect of the will itself. It directs the application, distribution, and mode of enjoyment of very large possessions then existing, and of future acquisitions by means of which their extent and value might be largely increased. Without going beyond the limits of my present duty, I think I may say that the testator had in his contemplation the "potentiality of wealth" (to use an expression which has become proverbial), and gave to his trustees unlimited powers so to deal with and handle his entire estate, as might most effectually realise his expectations. They have exercised those powers at their discretion, and as I gather, greatly to the advantage of the estate.

(1) 8 Hare, 291.

(2) 8 Hare, 298.

They might, if they had thought fit, have resorted to their power of raising the funds required by sale or mortgage. They have thought fit to employ the moneys which would otherwise have formed an accumulation to which the Plaintiff on attaining the age of twenty-one would have become entitled. If they had raised money by sale or mortgage they would have charged the *corpus* of the estate with the moneys so raised. That they were at liberty so to deal with the property entrusted to them is not and cannot be disputed. But there is clear authority for holding that in no case can the exercise by the trustees of their discretion alter or affect the rights *inter se* of *cestuis que trust.*

Upon the whole tenor and context, and upon the full scope of the will, upon the principles established by the cases referred to, upon the right which tenants for life have at all times to have adjusted all accounts so as to give effect to the true rights of all persons interested, and upon the established principle of marshalling, which I take to be applicable to the case before me, I have come, not without careful and anxious deliberation, to the conclusion that I am bound to decide the Plaintiff's claim in his favour, and declare that "the moneys expended out of income of the *Glamorganshire* estates received during the Plaintiff's minority by the trustees of the term of 1500 years created by the will, dated the 22nd of July, 1847, of the late Marquess of *Bute*, in constructing and enlarging docks and in other permanent works and improvements (including the purchase of land at or near *Cardiff*), for the benefit of the settled estates in the county of *Glamorgan* devised by the said will, are a charge upon the *corpus* of such parts of the said *Glamorganshire* estates as are comprised in the term of 1500 years."

Another question of, perhaps, minor importance, but, nevertheless, of some difficulty, arises respecting certain heirlooms which the testator intended beyond doubt to bequeath to the person who should for the time being be the owner and possessor of the testator's mansion-house, called *Mount Stuart House.* It would appear that the testator had at some time previous to the date of his will executed a deed of entail, comprising the *Mount Stuart* estate, and as will been seen, he referred to the deed in the bequest now to be considered; but by some accident, not now capable of explanation, the date of the deed is left blank in the will, and no such deed can now be found; but there is no reason to doubt that at the time of his death the testator was absolutely entitled to, or that the Plaintiff, as his heir-at-law, became upon his father's death entitled to, and is now the owner and possessor of *Mount Stuart House.* [His Lordship read the bequest of the *Luton Collection* from the will, as stated above, and the charges in the statement of claim with respect to it, and continued:—] That the bequest is in terms specific appears to admit of no doubt. I do not think that the mere accident or inadvertence by which it is impossible to ascertain or to give effect to so much of the bequest as contains a reference to the deed, can countervail the clear designation of "the person entitled to the possession of *Mount Stuart House*," and who is directed to sign the inventory of the chattels. Upon such words, regard being had to the context of the will, it is impossible to suppose that the testator can have died intestate as to the heirlooms thus specifically described and bequeathed, and considering their nature and the care the testator has taken that they should retain their specific character, it cannot be held that they passed by the gift of "all the residue" which immediately follows the bequest of the heirlooms.

I am of opinion, therefore, and I declare, in answer to the second question raised by the claim, that by virtue of the will of the late Marquess of *Bute*, the books, manuscripts, and pictures known as the *Luton Collection* belong to the Plaintiff, he being the person entitled to the possession of the mansion-house called *Mount Stuart House.*

Solicitors: *Farrer & Co.*

J. B. D.

KAY, J.

1884

May 19, 20;
June 12.

BOXALL *v.* BOXALL.

[1884 B. 646.]

Letters of Administration—Grant of—Will not appointing Executors—Suppression of Will—Sale of Leaseholds by Administrator—Title of Purchaser—Equity to a Settlement—Settlement of whole Fund.

A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void *ab initio*, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will, was upheld by the Court, although the grant was revoked after the sale.

Abram v. *Cunningham* (1) distinguished.

A husband entitled to leaseholds in right of his wife, deserted her and their children, and for eight years contributed nothing towards her or their support, except the rents of the leaseholds. During the desertion the leaseholds were sold by the wife for £250 to a purchaser, who expended the greater part of the proceeds upon the maintenance of the wife and children.

In an action by the husband against the wife and the purchaser to set aside the sale and recover the leaseholds or the proceeds :—

Held, that, under her equity to a settlement, the wife was entitled to have the entire proceeds of the sale secured to herself, and such proceeds having practically been expended for her benefit, the action must be dismissed with costs.

A TESTATRIX, who died in 1874, bequeathed a leasehold house, No. 18 *Hill Street, Dorset Square,* held for a long term of years, to her daughter, Mrs. *Boxall* (she paying the debts of the testatrix) by a will which contained no appointment of executors.

At the death of the testatrix, Mrs. *Boxall* was living with her husband, the Plaintiff. In the year 1876, he deserted her, leaving with her their three children, aged respectively twelve, eleven, and eight, and from that time he never contributed towards her or their support, except by allowing her to receive the rents of the house, which were of small amount.

The Plaintiff and his wife were both called as witnesses in this action, and there was a conflict in their evidence as to the circumstances attending the desertion.

The Plaintiff stated that his wife was of drunken habits, and that she and her children and the house in which they lived were in a filthy condition. She denied this, and stated that he left her in order to cohabit with another woman. This he denied; but he admitted that when he left his wife he told her she might have the rents of the house; and in that part of the judgment in which the facts of the case were stated his Lordship said he had no doubt that it was a clear case of desertion without any excuse which the law could recognise.

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(1) 2 Lev. 182.

No attempt was made to take out administration to the effects of the testatrix until November, 1879, when Mrs. *Boxall*, upon an affidavit that she was a widow, and that her mother had died intestate, obtained a grant of letters of administration to her mother's estate and effects.

Mrs. *Boxall* then mortgaged the leasehold house to the Defendant *Sampson* for £119, which sum was composed in part of a debt owing by the testatrix; and she afterwards contracted to sell the house to the Defendant *Plumridge* for £250.

Plumridge in his evidence stated that out of the purchase-money he paid £115 in respect of the mortgage, and that he had paid the rest to Mrs. *Boxall* (who was in very needy circumstances) by instalments for her maintenance, except a very small sum which still remained due to *Sampson*.

The evidence satisfied the Court that *Plumridge* purchased without any knowledge of the will, or of the fact that Mrs. *Boxall* had a husband living.

Upon the Plaintiff becoming aware of the facts he brought the present action against his wife and *Sampson* and *Plumridge*, and claimed an injunction to restrain any further dealings with the house, a declaration that the attempted mortgage and sale were invalid, and delivery up to him of the lease and title deeds.

After the commencement of this action proceedings were taken by the Plaintiff to recall the grant of administration to Mrs. *Boxall*, and by an order of the Probate Division of the 1st of May 1883, the letters of administration previously granted to her were revoked and cancelled, and new letters of administration with the will annexed were granted to her.

The lease of the house had been deposited in Court to abide the result of the action. At the trial Mrs. *Boxall* claimed her equity to a settlement, and the Court allowed the defence to be amended so as to raise the claim. The questions argued were, first, whether the sale of the house by Mrs. *Boxall* as administratrix was valid; and secondly, whether the Plaintiff had the right to recover against her or *Plumridge* any part of the purchase-money.

Hastings, Q.C., and *Beddall*, for the Plaintiff:—

The grant of administration, being obtained by suppression of the will, was void, and the attempted sale by Mrs. *Boxall* was invalid as against the Plaintiff: *Abram* v. *Cunningham* (1).

As the Plaintiff's interest in the house is a purely legal one, Mrs. *Boxall's* equity to a settlement does not attach, but we do not object to the income being settled on her for life.

They cited also *Macqueen* on Husband and Wife; *Walsh* v. *Wason* (2); *Guy* v. *Pearkes* (3); *Williams* on Executors (4).

Theodore Ribton, for the Defendant *Plumridge*:—

The grant to Mrs. *Boxall* was not invalid, because the will of the testatrix contained no appointment of executors, although it is otherwise where the will which is suppressed contains an appointment of executors, who have a right of property vested in them before probate.

In *Abram* v. *Cunningham* the will did appoint executors, and so the grant was void from its commencement. *Packman's Case* (5) is in point. There administration was granted to a stranger and afterwards revoked, and it was held that this did not affect acts done by the administrator in the meantime.

By the grant of administration the legal estate becomes vested in the wife, but the concurrence of the husband in any administrative act may be necessary. His concurrence, however, is for his own benefit, and he can waive it by acts and deeds outside the grant, and here what he did was, according to the evidence, equivalent to his saying: "Here is this property, to which various liabilities attach for repairs and otherwise, and I leave it to you to do what you like with it." And this amounted to a waiver of his concurrence. Again, if his concurrence was necessary, he has lost his right by standing by. As an illustration of this principle, a trustee in bankruptcy allowing the bankrupt to deal with the property as if it was his own loses his right: *Troughton* v. *Gitley* (1); *Engleback* v. *Nixon* (2).

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(1) 2 Lev. 182.

(2) Law Rep. 8 Ch. 482.

(3) 18 Ves. 195.

(4) 5th Ed. pt. 1, bk. 6, ch. iii. p. 518; pt. 2, p. 869; pt. 4, bk. 2, p. 1664.

(5) 6 Rep. 18 b.

He also cited *Bright* on Husband and Wife (3); *Williams* on Executors (4); 21 & 22 Vict. c. 95, s. 19; *Bacon's* Abridgment, tit. Executors and Administrators, p. 430; *The Conveyancing Act*, 1881, sect. 70; *In re Hall Dare's Contract* (5); and *Ex parte Bradshaw* (6).

The Defendant *Sampson* appeared in person.

Mrs. *Boxall* appeared in person.

Hastings, in reply.

June 12. KAY, J. (after stating the facts):—

The first question is whether the sale of the leaseholds can be supported. In *Abram* v. *Cunningham* (7) it was decided that where administration was granted on concealment of a will which appointed executors, the grant was void from its commencement, and all acts performed by the administrator in that character were equally void, and could not be made good though the executor should afterwards appear and renounce. A distinction, however, exists between that case and this, because in this case the will did not appoint executors. The report, like many reports of that time, has a short note of the judgment not containing any reasons. But the argument is given at some length, and in it reliance was placed chiefly on the fact that the concealed will had appointed executors, who therefore had a right of property vested in them before probate, and this I gather was the ground of the decision. No stress seems to have been laid upon the fraud committed in concealing the will; and indeed where the question was whether a third person should suffer who had acquired the property in good faith from an administrator apparently duly constituted, it would not be reasonable to visit him with the consequences of a concealment to which he was no party.

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(1) Amb. 629.

(2) Law Rep. 10 C. P. 645.

(3) Vol. ii. p. 39.

(4) 8th Ed. pp. 401, 402, 520.

(5) 21 Ch. D. 41.

(6) 2 D. M. & G. 900.

(7) 2 Lev. 182.

In *Packman's Case* (1) administration was granted to a stranger and was afterwards revoked, and it was held that the revocation did not affect acts done by the administrator in the meantime. If the grant had been reversed by a Court of Appeal it would be treated as void *ab initio,* but a revocation takes effect only from the time of the recall; and it was there said that "forasmuch as the first administrator had the absolute property of the goods in him without question he might give them to whom he pleased; and although the letters of administration be afterwards countermanded and revoked yet that cannot defeat the gift. But if the gift be by covin it shall be void by the statute of 13 Eliz. against a creditor, but it remains good against the second administrator."

The same point was decided in *Woolley* v. *Clark* (2).

I have not been able to find any case conflicting with these, nor any authority for the proposition that a grant of administration obtained by suppressing a will which contained no appointment of executors could be treated as utterly and *ab initio* void.

I am therefore of opinion that I cannot treat the sale by Mrs. *Boxall* under the first administration as void on that account. No other reason has been suggested for interfering with it, and I must therefore hold it to be a valid transaction.

There remains the question whether the husband has any right to recover against his wife or the purchaser any part of the purchase-money.

It is the case of a man who in the most heartless manner has deserted his wife and children, and for eight years has not been near them. This man now comes to a Court of Equity to ask assistance to recover against his wife this small leasehold property. She on the other hand claims her equity to a settlement, and I have allowed whatever amendment of her defence is requisite to raise this claim.

In such cases the Court has not unfrequently under the wife's

(1) 6 Rep. 18 b.

(2) 5 B. & A. 744.

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equity secured to her the capital as well as the income of a small property. In the case of *Re Broster*, on the 11th of June, 1859, Vice-Chancellor *Wood* ordered the dividends on a sum of about £400 in Court to be paid to a wife who had been deserted, for her separate use during her life, and gave her liberty to apply as to a settlement of the capital or otherwise as she might be advised.

A similar order was made by the late Master of the Rolls in the case of *Re Craddock* on the 6th of November, 1875. I have been furnished by Mr. *King*, the Registrar, with a copy of the order, which, after making a settlement upon the married woman for life, with remainder to her children, gave her liberty to apply to the Judge at Chambers for transfer of all or any of the capital to herself by way of revocation of such settlement.

I shall follow these precedents in this case, and, being of opinion that the wife was entitled to have the whole proceeds of these leaseholds secured to herself, and seeing that the greater part of such proceeds, all, indeed, except a trifling sum, has been expended on maintaining herself and her children, I dismiss this action with costs.

Solicitors: *F. Harvey & Co.; G. O. Rutter; Sampson.*

W. W. K.

In re MATHESON BROTHERS, LIMITED.

KAY, J.
1884
June 13.

Winding-up—Foreign Company with Branch Office, Assets and Liabilities in England—Jurisdiction to wind up—Pending Foreign Liquidation—Companies Act, 1862, *s.* 199 [*Revised Ed. Statutes, vol. xiv. p.* 247].

The Court has jurisdiction under sect. 199 of the *Companies Act*, 1862, to wind up an unregistered joint stock company, formed, and having its principal place of business in *New Zealand*, but having a branch office, agent, assets, and liabilities in *England*.

The pendency of a foreign liquidation does not affect the jurisdiction of the Court to make a winding-up order, in respect of the company under such liquidation, although the Court will as a matter of international comity have regard to the order of the foreign Court.

It being alleged that proceedings to wind up the company were pending in *New Zealand*, the Court, in order to secure the English assets until proceedings should be taken by the *New Zealand* liquidators to make them

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available for the English creditors *pari passu* with those in *New Zealand*, sanctioned the acceptance of an undertaking by the solicitor for the English agent of the company, that the English assets should remain *in statu quo* until the further order of the Court.

In re Commercial Bank of India (1) approved.

PETITION.

This was a creditor's winding-up petition. The company was formed in *New Zealand* and registered under the *Companies Act*, 1862, of the legislature of *New Zealand*, but not under the *Companies Acts* of this country.

Its registered office was at *Dunedin* in *New Zealand*, and its primary object was to carry on business in *New Zealand*, where its shareholders and also its creditors were mostly resident, and where the bulk of its assets were situate.

The company had, however, a branch office in *Basinghall Street*, and a managing director and agent in *London*, one Mr. *M. J. Hart*, and it had done business in *London*, and had contracted liabilities in *England* to the extent of about £5000.

The English assets of the company consisted of a sum of £150 at its bankers, and certain office furniture and fittings in *Basinghall Street*.

It was stated that proceedings to wind up the company were pending in the Courts of *New Zealand*, and that liquidators had been appointed there, although no authority to act in their name had been received by Mr. *Hart*.

Hastings, Q.C., and *Seward Brice*, for the Petitioner:—

It is settled that this Court has jurisdiction to make a winding-up order in respect of a foreign company having an agent and an office in *England*: *In re Commercial Bank of India*; *In re Union Bank of Calcutta* (2).

It is alleged that there is a liquidation pending in *New Zealand*, but there are assets here, and another creditor is suing the company in the Queen's Bench Division, and may seize those assets. They should accordingly be protected for the benefit of the general body of English creditors. It is the constant practice to have two administrations going on at the same time, for instance one in *France*, and the other in *England*, and why not two liquidations?

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(1) Law Rep. 6 Eq. 517.

(2) 3 De G. & Sm. 253.

Kay, J.:—Would not your object be gained if I appointed a provisional liquidator.

Kekewich, Q.C.:—Taking possession of the assets would be objected to.

Kay, J., then, after referring to *In re Imperial Anglo-German Bank* (1), and *In re Madrid and Valencia Railway Company* (2), called upon the counsel in opposition to the petition.

Kekewich, Q.C., and *Haldane*, for Mr. *Hart*, the *London* manager of the company:—

Although this company has a branch in *London* it is in fact a foreign company, and the Court has no jurisdiction under the *Companies Acts* to wind up a foreign company; *Lindley* on Partnership (3); *Bulkeley* v. *Schutz* (4); *Bateman* v. *Service* (5); *In re Orr Ewing* (6); and if not, the Court cannot appoint a provisional liquidator. The powers of the Court are strictly statutory; and in framing the *Companies Acts* the Legislature could only have had within its purview companies constituted according to English law. This is not a company which could be "dissolved" under sect. 111, and this shews that the company is not within the scope of the Act. The Court may have a protective power to prevent the assets from going otherwise than to the right hands, but in this case the right hands are those of the liquidators according to the domicil (so to speak) of the company, who could appoint an attorney here for that purpose.

In re Commercial Bank of India (7), on which the other side rely, was of a peculiar character, the petition was unopposed, and the case is not available as an authority for the present proposition: *Lindley* on Partnership (8); and in *In re Union Bank of Calcutta* (9) the Court expressly guarded itself against deciding the point.

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(1) W. N. 1872, pp. 3, 40.
(2) 3 De G. & Sm. 127.
(3) 4th Ed. p. 1486.
(4) Law Rep. 3 P. C. 764.
(5) 6 App. Cas. 386.
(6) 22 Ch. D. 456.
(7) Law Rep. 6 Eq. 517.
(8) 4th Ed. p. 1233.
(9) 3 De G. & Sm. 253.

As there is a liquidation pending in *New Zealand*, Mr. *Hart* no longer represents the company, accordingly service on him is not sufficient, and the *New Zealand* liquidators ought to be before the Court: General Orders, November, 1862, rule 3; *Buckley* on the *Companies Acts* (1).

Again, foreign bankruptcies are recognised by English Courts: *Robson* on Bankruptcy (2); *Dicey* on Domicil (3); and by analogy and on principles of international law and comity, this Court should refuse to interfere with the liquidation pending in the colonial Courts.

Kay, J.:—Will the Petitioner accept the undertaking of *Hart's* solicitor that the English assets shall not be removed out of the jurisdiction of the Court.

Hastings, Q.C.:—He will.

Kay, J.:—

I think that the Court has jurisdiction to make a winding-up order upon a petition of this kind, otherwise there might be no means by which the English creditors could obtain payment of their debts. In my opinion, this company comes within the provisions of the 199th section of the *Companies Act* of 1862. That section provides that, subject as therein mentioned, "any company, except railway companies incorporated by Act of Parliament, consisting of more than seven members and not registered under this Act," and thereinafter included under the term "unregistered company," may be wound up under the Act; and it provides also that "an unregistered company shall for the purpose of determining the Court having jurisdiction in the matter of the winding-up, be deemed to be registered in that part of the *United Kingdom* where its principal place of business is situate."

Now, I have here a company incorporated or formed in *New Zealand* consisting of more than seven members and not registered under that Act. Applying then the test in the section, is this an unregistered company which can be wound up under the Act? I find it has a place of business in *London*, where it has carried on business, contracted debts to the amount of about £5000, and has assets. Its assets here are, no doubt, very small, very much less than £5000. But putting aside any question which may arise by reason of the winding-up order made in *New Zealand*, is it to be said that a company formed in a foreign country, which chooses to carry on business, have assets, and contract debts in this country does not come within the spirit as it clearly comes within the letter of the 199th section. It is argued that this is a company which cannot be "dissolved," and reference has been made to sect. 111 of the same Act, which provides that when the affairs of the company have been completely wound up the Court shall make an order that the company shall be dissolved from the date of such order, and the company shall be dissolved accordingly, and the contention is that no company is within the scope of this Act unless the Court has jurisdiction to dissolve it. But the dissolution of a company is brought about by a separate order of the Court, and it by no means follows that because the Court has no power to make an order to dissolve a company that it has no power to make an order to wind it up, and, as a matter of fact, wound up companies very seldom are dissolved; while the 199th section of the Act is large enough in its terms to include such a company as this. Let us take for illustration the case I put during the argument. Suppose a joint stock company formed in a foreign country for the purpose of working a series of patents, one of which is an English patent, and suppose that after awhile all the business of the company came to be carried on in this country, all its debts and assets came to be localized here and its only remaining place of business came to be situate in *England*. Could it be said that the Court would have no jurisdiction to wind up such a company under the 199th section? Mr. *Kekewich* very frankly answered that there would be no jurisdiction; but what a most inconvenient result it would be if all the assets, all the business, and, it may be, all the shareholders of a company were locally situated here, and yet that company did not come within the Act. That would be a very singular construction to put upon a section which is amply large enough to include the company in letter and in spirit as well.

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(1) 4th Ed. p. 565.

(2) 5th Ed. p. 503.

(3) Pages 277–280.

Had it not been then for the fact of a winding-up order existing in *New Zealand* this Court would in my opinion have had jurisdiction to wind up this *New Zealand* company having an office and carrying on part of its business here as an unregistered company within the terms of the 199th section.

This being the case, what is the effect of the winding-up order which it is said has been made in *New Zealand?* This Court upon principles of international comity, would no doubt have great regard to that winding-up order and would be influenced thereby, but the question of jurisdiction is a different question, and the mere existence of a winding-up order made by a foreign Court does not take away the right of the Courts of this country to make a winding-up order here, though it would no doubt exercise an influence upon this Court in making the order. Now at this moment there are no proceedings pending to secure the assets here, nor has any application been made to the Courts of this country for that purpose, and in the meantime, however ready this Court may be to shew courtesy to the Courts of *New Zealand*, it does seem proper to interfere, and that sufficient reason exists for taking proceedings in order to secure the English assets. Having, therefore, jurisdiction to make a winding-up order I feel myself at liberty to sanction the acceptance of the undertaking offered by Mr. *Hart*. I have said thus much as to my own opinion upon the effect of the Act. But there is the authority of *In re Commercial Bank of India* (1), in which counsel of eminence were engaged on both sides, Mr. *Southgate*, Q.C., Mr. *Bristowe*, and Mr. (now Lord Justice) *Lindley* being for the petitioners, and Mr. (now Lord Justice) *Baggallay* and Mr. *Kekewich* for the official liquidator of the new company. There a joint stock company formed in *India*, registered under Indian law, and having its principal place of business in *India*, with an agent and a branch office in *England*, was ordered to be wound up under the Act of 1862, and Lord *Romilly* said (2): "I think I have jurisdiction to make the order; if the company is not wound up here, these persons will not be able to get their money."

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(1) Law Rep. 6 Eq. 517.

(2) Law Rep. 6 Eq. 519.

Now that case was decided in 1868, and no authority against it has been cited. Certain *obita dicta* in a case in which the present point did not arise and an observation in Lord Justice *Lindley's* book on Partnership have been referred to, but nothing amounting to this, that *In re Commercial Bank of India* (1) was wrongly decided. That decision is one which I should be disposed to follow, even if, as is not the case, my own opinion had been the other way. I shall accordingly hold that the Court has sufficient jurisdiction to sanction the acceptance of the undertaking, and if the undertaking had not been given that it had sufficient jurisdiction to appoint a provisional liquidator; for I consider that I am justified in taking steps to secure the English assets until I see that proceedings are taken in the *New Zealand* liquidation to make the English assets available for the English creditors *pari passu* with the creditors in *New Zealand*.

Solicitor for Petitioner: *Walter Barnett Styer.*
Solicitors for Mr. *Hart*: *George Wright & Co.*

W. W. K.

HUGHES *v.* COLES.

[1878 H. 406.]

KAY, J.
1884
July 7, 10.

Annuity charged on Land and the Rents thereof—Right first accrued in 1851—*Claim first made in* 1884—*Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 1 [*Revised Ed. Statutes, vol. vii., p.* 387]—*Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 9, 10.

By an indenture executed in 1833, real estate was conveyed to trustees and their heirs upon trust as to one moiety that immediately after the death of *M. C.* they should out of the moiety and the rents and profits thereof pay unto *J. M.*, and to his heirs and assigns, or permit him or them to receive it, an annuity of £8 half-yearly.

M. C. died in 1857. No payment was ever made in respect of the annuity, and the annuitant first made a claim in 1884. The Chief Clerk had certified that he was entitled to a perpetual annuity.

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(1) Law Rep. 6 Eq. 517.

On summons to vary the certificate:—

Held, that, by sect. 1 of the Act 37 & 38 Vict. c. 57, no proceeding to recover any "rent," which, inasmuch as by sect. 9 the Act must be construed with the 3 & 4 Will. 4, c. 27, meant by the interpretation clause of that Act, any annuity charged upon land, could be taken after twelve years from the time when the right first accrued, therefore if there had not been any trust, those twelve years having elapsed, none of the past instalments of the annuity could be recovered, and that the effect of sect. 10 of the 37 & 38 Vict. c. 57, was that no payment of the annuity which became due before the application was made was recoverable, the remedy being only the same as if there had not been any trust.

THIS was an action for partition of freehold estate or for a sale.

By an indenture of release, dated the 15th of September, 1833, certain real estate was conveyed to trustees and their heirs upon trust, as to one moiety thereof, that from and immediately after the decease of *Mary Coles* they should, by, with, and out of the same moiety and the rents and profits thereof pay unto *J. W. F. M. Morgan*, and to his heirs and assigns for ever, or permit him or them to receive it, an annuity or clear yearly sum of £8 half-yearly, and subject thereto other trusts were created.

Mary Coles died in the year 1857, and from that year down to the 8th of June, 1884, no claim whatsoever was made in respect of the said annuity, but the trustees of the deed of 1833 had paid the whole of the net rents and profits of the same moiety on which the annuity was charged to the persons who were entitled to the estate subject to the annuity.

Judgment was given in the action in 1882, and it was then ordered that accounts should be taken and inquiries made as to the persons interested, and that the estate should be sold, and it had been sold, and the proceeds of sale paid into Court.

By the certificate of the Chief Clerk it was certified that the moiety of the estate was subject, under the provisions of the indenture of 1833, after the death of *Mary Coles*, to a perpetual annuity of £8 payable to *J. W. F. M. Morgan*.

A summons was taken out by some of the persons interested in the fund, asking that the certificate might be varied by certifying that the moiety of the estate was not now subject to the annuity, and it was adjourned into Court, and now came on to be heard with the further consideration. At the hearing the only point raised was in reference to the arrears previously to the claim in June, 1884.

Maidlow, for the summons, submitted that this charge came within the 10th section of the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), which enacted that "after the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust," and this was a sum of money charged upon land and secured by an express trust. By sect. 9 of the Act of 1874 all the provisions of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), (with certain exceptions), were to remain in force and to be construed together with the Act of 1874, and by sect. 1 of the Act of 1833, "the word 'rent' shall extend . . . . to all annuities and periodical sums of money charged upon or payable out of any land"; this annuity was therefore a rent, and was secured by an express trust, and clearly came within the language of sect. 10, and the effect of it was to remove altogether the provision of sect. 25 of the Act of 1833, which protected land or rent which was vested in a trustee upon any express trust, consequently a claim of this sort was barred unless it were made "within twelve years next after the time at which the right" to bring an "action or suit shall have first accrued" (sect. 1 of the Act of 1874), and such right (sect. 2), "to recover any land or rent shall be deemed to have first accrued . . . . at the time at which the same shall have become an estate or interest in possession," that was to say the time when the annuity first became payable. Therefore nothing now could be recovered in respect of the arrears of the annuity because more than twelve years had elapsed next after the time at which it became an interest in possession in 1851. Should it be considered that sect. 10 did not apply, it was clear that only six years' arrears of the annuity could be recovered.

Hastings, Q.C., and *C. Parke*, for parties in the same interest, adopted the arguments.

Upjohn, for the annuitant:—

As regarded the arrears of the annuity, all that was claimed was six years under sect. 42 of the 3 & 4 Will. 4, c. 27. As regarded the annuity, it was not a sum of money charged upon land, but it was rent, as the fruit of which every half-year there accrued due a sum of money, but the rent itself was not a sum of money. *Edwards* v. *Warden* (1) shewed that "sum of money" were words applicable to each instalment of the annuity as it became due, and not to the whole annuity or a series of successive sums of money. If the language of sect. 10 of the Act of 1874 were compared with that in sect. 8 it would be seen that the words "land or rent" must be read together, and that sect. 10 only extended to the sum of money or legacy which was charged upon any land or rent, and was secured by the express trust, and treating each successive instalment of the annuity as a sum of money charged upon land, then under sect. 8 the present right to receive the sum of money did not accrue until it became payable, therefore, as to each instalment or fruit of the annuity, the statute did not begin to run until the day of payment of the instalment had arrived. The case was governed by sect. 1 of the Act of 1874 and sect. 25 of the Act of 1833, and was not affected by sect. 10 of the Act of 1874, as that applied only to the case of a particular sum charged upon land.

Townsend, for other parties.

Maidlow, in reply:—

In *Edwards* v. *Warden* there was not an annuity charged upon land, and hence a distinction between that case and this, and it did not come within clause 1 of the Act of 1833. In effect it was argued that although the original rent might have been barred by the statute, yet every year there would be a new rent accruing; but if there had been no express trust the rent would have absolutely gone twelve years after 1851, and sect. 10 of the Act of 1874 put the several half-yearly payments of the annuity upon the same footing as if there had been no express trust. [He referred to the case of *In re Ashwell's Will* (1).]

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(1) Law Rep. 9 Ch. 495; 1 App. Cas. 281.

Kay, J., after stating that by a deed dated the 15th of September, 1833, certain real estate was conveyed to trustees upon trust to pay an annuity to *J. Morgan*, his heirs and assigns, for ever; that the right to receive the annuity first accrued more than twenty years ago; and that nothing had ever been paid in respect of it, said:—

The question is as to the effect in that state of things of the recent *Statute of Limitations*, 37 & 38 Vict. c. 57, s. 10. It is obvious that the terms of the section do not destroy the right to recover any future payments of the annuity. "Any sum of money" may apply to each instalment of the annuity as it becomes due, as was said in *Edwards* v. *Warden* (2), so that the right to recover any one payment of the annuity is the same under that section as if there were no trust, but the right to future payments has not yet arisen at all, and consequently the section does not apply to such future payments. This was admitted in the argument, and the real question is, What is the effect of the section upon the payments which had become due before the present application was made. By sect. 9 the Act is to be construed together with the Act 3 & 4 Will. 4, c. 27, s. 1; the interpretation clause of that Act provides that the word "rent" shall extend to all annuities charged upon or payable out of any land; and sect. 42 provides that no arrears of rent shall be recovered but within six years, and if the annuity be, as it is admitted, an existing charge, six years' arrears would be recoverable under that section. But by sect. 1 of the Act of 1874 no proceeding to recover any rent, that is, any annuity charged upon land, can be taken after twelve years from the time when the right first accrued; therefore if there were not any trust, those twelve years having elapsed, none of the past instalments of the annuity could now be recovered. That is precisely what

(1) Joh. 112.

(2) Law Rep. 9 Ch. 505.

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sect. 10 of the Act of 1874 says must now happen; and accordingly it seems to me that the result is that no payment of the annuity which became due before this application was made in June, 1884, can now be recovered, because as to any such sum the remedy is only the same as if there were not any trust, in which case it would be irrecoverable.

There must be an order declaring that *J. W. F. M. Morgan* is entitled to the annuity, but that he is not entitled to any of the arrears previously to the 8th of June, 1884.

Solicitors: *Samuel Price & Son; F. Venn; Stones, Morris, & Stone; Henry Adkin.*

T. F. M.

FUSSELL *v.* DOWDING.

CHITTY, J.

1884

June 11.

[1872 F. 7.]

Practice—Expiration of Time limited for appealing—Revivor—Special Circumstances—Discretion of the Court—Rules of Supreme Court, 1883, *Order* XVII., *r.* 4.

By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime then for the husband for his life, and subject thereto for such persons as should be of the wife's own kindred as she should by will appoint, and in default of appointment for such persons as would be entitled under the Statutes of Distribution, in case she had died intestate and unmarried.

The marriage was dissolved in 1871, and in 1872 the wife, in a suit instituted by her against her late husband and the trustees of the settlement, obtained a decree that she was absolutely entitled to the property comprised in the settlement.

By her will, dated in 1877, the wife disposed of the property as if it was her own absolutely, and died in 1881, in the lifetime of her late husband:—

Held, in the absence of special circumstances, that the next of kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings therein for the mere purpose of appealing against the decree of 1872.

BY a settlement dated the 30th of April, 1858, made on the marriage of the Plaintiff, *Maria Mary Fussell,* and *Pierre, Count de Gendre,* certain real and personal estate to which the Plaintiff was entitled was vested in trustees upon trust during the joint lives of the *Count de Gendre* and the Plaintiff, for the Plaintiff for her separate use, and if there should not be any issue of the marriage then that the trustees should stand possessed of the trust fund for the Plaintiff, her executors, administrators, and assigns, in case she survived the *Count de Gendre,* but if she should die in his lifetime, then in trust, after her decease and such failure of issue as aforesaid, to pay the income to the *Count de Gendre* for the residue of his life, and subject thereto for such persons as should be of her own kindred, in such manner as the Plaintiff should by will appoint, and in default of such appointment, for such persons as would be entitled thereto under the

Statutes of Distribution in case she had died intestate and unmarried.

There was no issue of the marriage.

In July, 1870, the Plaintiff presented a petition to Her Majesty's Court for Divorce and Matrimonial Causes, praying for a dissolution of the marriage, upon which a decree *nisi* for the dissolution of the marriage was obtained, and by a final decree made on the 7th of November, 1871, the marriage was dissolved.

The Plaintiff filed her bill against her late husband and the trustees of the settlement praying that she might be declared absolutely entitled to the property.

By the decree made on the hearing of the cause, dated the 12th of July, 1872 (1), the Court declared that the Plaintiff was entitled to the whole property.

The trustees of the settlement thereupon assigned and transferred to the Plaintiff all the property comprised in the settlement.

The Plaintiff, by her will, dated the 2nd of January, 1877, disposed of her real and personal estate, which had been held under the trusts of the settlement, as if the same was her own property, and after devising certain real estate (which had been so held as aforesaid) and providing for certain legacies and annuities, she bequeathed her residuary personal estate for charitable purposes, as therein mentioned.

The Plaintiff died in the month of December, 1881, in the lifetime of her late husband.

On the 12th of March, 1884, *Elizabeth Kent*, the sole next of kin and an annuitant under the will of the Plaintiff, *Maria Mary Fussell*, applied by way of motion to the Court of Appeal for leave to appeal from the decree dated the 12th of July, 1872, when the Court directed the motion to stand over in order to enable the applicant to make such application as she might be advised to revive the suit.

This was a motion on behalf of the applicant, that in default of *Henry Holland Burne*, the legal personal representative of *Mary Maria Fussell*, obtaining an order to revive the suit, or carry on proceedings therein within a certain time named, then that the said suit might stand revived from the date of the present application without further order, and that proceedings therein might be carried on between the said *H. H. Burne*, as such representative of the Plaintiff, and the Defendants as the same might have been carried on between the Plaintiff and the said Defendants.

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(1) Law Rep. 14 Eq. 421.

Grosvenor Woods, in support of the motion :—

I submit that the applicant in this case ought to have been made a party in the first instance to the proceedings in this suit.

The trustee at the date of this decree could not properly represent the next of kin, because until the death of Mrs. *Fussell* they were an unascertainable class.

I submit that as a person having a substantial interest and prejudiced by the decree, the applicant is entitled to the order now asked for: *Burstall* v. *Fearon* (1).

Notwithstanding the lapse of time, the Court will not refuse to exercise its discretion, but it will allow the suit to be revived, as justice can only be done in that way: *Curtis* v. *Sheffield* (2).

Macnaghten, Q.C., and *Northmore Lawrence*, for the surviving trustee of the settlement :—

The decree in this suit has been fully worked out, and there remains nothing more to be done in the suit. The Court will not allow a suit to be revived for the mere purpose of an appeal.

The time for appealing, moreover, has long since expired: *Curtis* v. *Sheffield* (3). Great injustice would be done if applications of this kind were allowed to succeed.

Romer, Q.C., and *B. B. Rogers*, for the legal personal representative of the testatrix.

Grosvenor Woods, in reply.

CHITTY, J. :—

This is an application for an order to carry on the proceedings in the suit of *Fussell* v. *Dowding* (4). The position of the applicant is this. She alleges, and I understand has given *primâ facie* proof, that she is one of the next of kin of Mrs. *Fussell*. Mrs.

(1) 24 Ch. D. 126.
(2) 20 Ch. D. 398.
(3) 21 Ch. D. 1.
(4) Law Rep. 14 Eq. 421.

Fussell instituted a suit in 1872, and in July of that year a judgment was made which was final on the face of it. It was a declaration that she was entitled absolutely to the whole of the property comprised in her marriage settlement, and that was followed by a direction that the trustees should transfer the property over to her. It is not for me to say whether that decree was right or wrong. I think I ought to assume that it was right.

The decree, as I have said, was final, and there has been no objection brought forward as to the suit having been properly constituted at the time the decree was made, and as to the suit having been properly conducted. The circumstances were such that it was impossible to make her next of kin parties, because she being alive, her next of kin under the Statutes of Distribution were necessarily an unascertained class. If a decision is wanted, I refer to the case of *Clowes* v. *Hilliard* (1) for the purpose of shewing that persons in that situation could neither have maintained a suit themselves, nor would they have been necessary or proper parties to any suit that might have been instituted by anyone else. *Ex necessitate rei* they, being an unascertained class, and a class that could not be represented by an individual member of it at the time, were according to the law of the Court, not depending on any statutes, represented by the trustees. And the trustees in the suit did their duty, contested the case, and notwithstanding their argument, the decree which I have already referred to was made.

At the time when that decree was made the time for appealing was five years, and Mrs. *Fussell* has lived and died in the belief, which she was justified in entertaining, that that decree was final, and that the property which had thus been adjudged to belong to her, did belong to her, and that it could not be taken away from her. Under those circumstances she made her will about five years after the date when the decree was made, and under that will the present applicant does take an interest. Nothing whatever remains to be done under the decree.

Now the applicant avowedly asks for an order to revive simply for the purpose of appealing; when I say "revive," I mean to carry on the proceedings. The rule under which the present application is necessarily made is rule 4 of Order XVII., and, passing by the introductory matter, I refer to the rule for the purpose of reading these words only, "where . . . it becomes necessary or desirable that any person not already a party should be made a party," an order may be obtained. It seems to me that the Court has a discretion in making the order, and the applicant is bound to shew that it is either necessary or desirable for the purpose of working out the decree. In this case the decree admittedly has been worked out, and a transfer of the funds has been made years ago. The only object, therefore, is that there may be an appeal from the decree.

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(1) 4 Ch. D. 413.

It appears to me, having regard to the observations which fell from the late Master of the Rolls in *Curtis* v. *Sheffield* (1), that in cases of this kind, where the only object of a party asking for an order is to appeal, and where there are no special circumstances in the case, where, for instance, there is no suggestion of collusion or fraud, or the like, and where there is no irregularity, as there was in the case of *Walmsley* v. *Foxhall* (2), where the decree had erroneously dealt with future rights, the right rule to be observed is this, that such an order should not be made after the expiration of the time which is limited now for an appeal, namely, one year. It is not necessary to go so far as that in the case which I am dealing with, because a period of something like twelve years has elapsed since that decree was made. I think that the application ought not to succeed, that it certainly is not "necessary" nor, in my opinion, "desirable" that such an order should be made. It is for the benefit of all suitors that they should be able to act on a judgment, which on the face of it is final, after the time has elapsed for the bringing of any appeal, and I think they are entitled so to act, and treat that judgment as final unless there are special circumstances which I am quite clear there are not in this case. It is said by Mr. *Grosvenor Woods* that there is a hardship in the case, because the next of kin were not before the Court, but they were before the Court in the only way in which they could be. They were represented by the trustees, and the trustees did their duty to them. I think I should be making a very evil precedent, and one that would be

(1) 21 Ch. D. 1.

(2) 1 D. J. & S. 451.

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most injurious to suitors, particularly having regard to the amended practice under which the Court can appoint parties to represent other persons in a suit, if I were to say that the fact alone that they were not actual parties, but only represented, is a ground for making such an order as is asked for. I hold that the application fails, and must be refused with the usual consequence.

Solicitors: *Guscotte, Wadham, & Daw*; *Robinson, Preston, & Stow.*

G. M.

CHITTY, J.
1884
April 7;
June 23;
July 7.

In re WILSON,
WILSON *v.* ALLTREE.

[1880 W. 737.]

Administration Action—District Registry—Taxation—Taxing Officer—District Registrar—Rules of the Supreme Court, 1883, *Order* XXXV., *r.* 4; *Order* LXV., *r.* 27, *sub-s.* 43—*Supreme Court Funds Rules,* 1884, *rr.* 3, 11, 12, 98, 111.

The Court can, in its discretion, order the taxation of costs in an administration action commenced and prosecuted in a District Registry to be made by the District Registrar.

The term "Taxing Officer" in rules 3, 11, and 12 of Supreme Court Funds Rules, 1884, these rules being read in conjunction with Order LXV., rule 27, sub-s. 43 of Rules of Supreme Court, 1883, includes "District Registrar," where the Court has directed taxation to be made by that officer, and the Paymaster is bound to act on the certificate of taxation of a District Registrar, when the Court, in the exercise of its discretion, has directed taxation in the District Registry.

The Court, however, following *Day* v. *Whittaker* (1), will not, except under very special circumstances, direct the costs of an action commenced in a District Registry to be taxed otherwise than by a Taxing Master of the Chancery Division.

THIS action was an administration action, and had been commenced in 1880 in the *Liverpool* District Registry, where all the accounts and inquiries had been taken and made, and the District Registrar having made his certificate the action came on upon further consideration, as a short cause, before *Chitty*, J., on the

(1) 6 Ch. D. 734.

7th of April. The minutes of the order contained a decree for taxation of costs by the District Registrar, lodgment in Court of a sum then in the District Registry and payment of the costs when taxed out of the fund in Court.

Upon drawing up the order the Registrar raised the objection that, having regard to the Supreme Court Funds Rules, 1884, the Paymaster could not act upon the certificate of the District Registrar, and therefore that the order ought to direct taxation by a Taxing Master of the Chancery Division.

The matter was mentioned to the Court on the 23rd of June, and then stood over in order that the Judge might communicate with the Registrar and the Paymaster on the subject.

Ince, Q.C., and *Christopher James*, for the Plaintiff.

Melville, for the Defendants.

They referred to Order XXXV., rule 4, and Order LXV., rule 27, sub-s. 43 of rules of the Supreme Court, 1883, and to Supreme Court Funds Rules, 1884, rules 3, 11, 12, 98, & 111.

CHITTY, J.:—

A doubt has been suggested by the Registrar on drawing up this order, after seeing the Paymaster, whether where an action such as this has been commenced in the District Registry, and all the accounts and inquiries have been taken and prosecuted there, and the fund has subsequently been transferred into Court, the Paymaster is authorized, in the event of an order being made for taxation in the District Registry, to act on the certificate of the District Registrar.

The difficulty has been caused by rule 111 taken in connection with rules 3, 11, and 12 of the Supreme Court Funds Rules, 1884.

A portion of the estate administered in this action, consisting of about £1510, is at present in the *Liverpool* District Registry, and it is proposed to bring this sum into the pay-office in *London*, and so make it "funds in Court" within the definition of rule 3.

Now rule 111 says, "These rules shall not apply in the District Registries to funds in Court or hereafter lodged in Court." It was suggested in argument that for the purposes of the present case the rule must be interpreted as if the words "funds in Court" were equivalent to the words "funds in a District Registry." That would be simply nonsensical, as funds in a District Registry are clearly not "funds in Court." No doubt there is some difficulty in construing this rule, but probably the best interpretation of it is to say that these rules do not apply in District Registries to funds in Court where the order for payment has been made by the District Registrar, because the Paymaster might find a difficulty in acting on orders, not perhaps always in the same form, made by the numerous District Registrars throughout the country; but whether this is the true interpretation of the rule or not, the Paymaster can, in my opinion, safely act, and, indeed, is bound to act, on the certificate of taxation of the District Registrar where this Court has in the exercise of its discretion directed taxation in the District Registry.

Now, turning to rule 3, the interpretation of terms rule, I find that Taxing Officer means a Taxing Master in the Chancery Division of the Court, and the Master or person whose duty it is to tax the costs in the other Divisions or in Lunacy; and then the same rule says "in causes and matters pending in a District Registry," which is the case here, "Taxing Officer means District Registrar." [His Lordship then read rules 11 and 12 of the Supreme Court Funds Rules, 1884, and continued:—] I think in these rules the words "Taxing Officer," on whose certificate the Paymaster is to act, must be read in connection with Order LXV., rule 27, sub-sect. 43, of the Rules of the Supreme Court, 1883, so as to make "Taxing Officer" equivalent to District Registrar when the Court has ordered taxation to be made by that officer; for I cannot read rule 111 of the Supreme Court Funds Rules, 1884, as destroying or stultifying the Rules of the Supreme Court, 1883.

The result, therefore, in my opinion, is that where the Court in its discretion orders taxation to be made in the District Registry, the Paymaster can safely act on that order though the taxation has not been made by a Taxing Master of the Chancery Division. The certificate on which he has to act will, under rule 98 of the Supreme Court Funds Rules, 1884, be transmitted by the proper officer to the Audit Office, and there can be no difficulty in obtaining it. The order may therefore go in the form originally proposed.

There is one other point on which I must make some observations. I find that Vice-Chancellor *Hall,* in a case of *Day* v. *Whittaker* (1), stated that he should not, except under very special circumstances, direct the costs of actions of this kind, though commenced and prosecuted in the District Registry, to be taxed otherwise than by a Taxing Master in the Chancery Division. If I may respectfully say so, I think that is the right principle to act upon in these cases. I have had the advantage of conferring with the *Liverpool* District Registrar as to the orders that have been made from time to time for taxation of costs in the Registry there, and from the numerous orders with which he has furnished me, it appears that similar orders to that now proposed have been made by several other Judges.

It is to be observed that Order xxxv., rule 4, of Rules of the Supreme Court, 1883, providing that where final judgment is entered in the District Registry, costs shall be taxed in such Registry unless the Court or a Judge shall otherwise order, seems in all its terms to apply, using the old phraseology, to Common Law actions rather than to Chancery actions, since the former class of actions are more appropriately indicated by the expression "final judgment." The principle, therefore, which I propose to adopt is that laid down in *Day* v. *Whittaker.*

Undoubtedly the Court still has power to direct taxation in *London,* and this practice ought, in my opinion, to be adhered to except under special circumstances. The District Registrars cannot be expected to possess the skill and experience of the Chancery Taxing Masters, and a variation of practice might arise which would be very undesirable. In addition to this many of the District Registrars in the smaller Registries are practising solicitors, possibly exposed to local influence, and it is therefore not expedient that they should act as Taxing Masters.

In the present case the district is a large one: similar orders for taxation have already been made in it, and all the accounts have been taken and the inquiries prosecuted there.

I mention these facts as some of the special circumstances that

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(1) 6 Ch. D. 734.

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induce me to make this order. I think I shall not be departing from the principles I have previously enunciated by allowing taxation in this case to be made in the District Registry.

I have communicated with the Chancery Registrars and with the Paymaster as to the practice, and there will now be no further difficulty in drawing up or acting upon the order.

Solicitors: *John Wilkinson*, agent for *Wright, Becket, & Co., Liverpool; Gregory, Rowcliffes, & Co.*, agents for *Ambler, Birkenhead.*

G. M.

CHITTY, J.
1884
June 21; *July* 7, 8, 9.

PLATT *v.* MENDEL.

[1884 P. 885.]

Practice—Foreclosure Action—Mortgagor—Mortgagee—Subsequent Incumbrancers—Period for Redemption.

A first mortgagee is *primâ facie* entitled to a judgment in a foreclosure action limiting only one period for redemption, both as against subsequent incumbrancers and the mortgagor, and where there are conflicting claims as to priority between co-Defendants, the practice, as settled by *Bartlett* v. *Rees* (1), is to grant only one period for redemption. Where, however, the Defendants have put in a defence or appeared at the bar and have proved or offer to prove their incumbrances, and there is no question of priority between them, the Court will at the request of the puisne incumbrancers, but not at the request of the mortgagor, limit successive periods for redemption.

A mortgagor has no right in himself to more than one period of six months to redeem.

In a foreclosure action by the transferee of the first mortgagee, the statement of claim alleged that the Defendants other than the mortgagor claimed to have some charge upon the mortgaged premises subsequent to the Plaintiff's charge. None of the Defendants, including the mortgagor, put in a defence or appeared at the bar :—

Held, that the Plaintiff was entitled to a foreclosure judgment on the pleadings, allowing one period for redemption as against all the Defendants.

THIS was an action for foreclosure by the transferee of a mortgage against the mortgagor and other persons, whom the Plaintiff alleged in his statement of claim claimed to have some charge on the mortgaged premises which was subsequent to the Plaintiff's mortgage.

(1) Law Rep. 12 Eq. 395.

The action now came on for trial upon motion for judgment in default of pleading. The Defendants had all appeared in the action by the same solicitor, but did not now appear.

The proposed minutes of judgment provided that all the Defendants should be absolutely foreclosed in the event of their not paying to the Plaintiff the amount which should be found due to him on his security within six calendar months after the date of the Chief Clerk's certificate.

Leonard Field, and *Lees Knowles,* for the Plaintiff:—

The only question on these minutes is whether one period should be fixed for redemption for all the Defendants or whether there should be successive periods for redemption.

[They referred to *Edwards* v. *Martin* (1); *Beevor* v. *Luck* (2); *Titley* v. *Davies* (3); *Bartlett* v. *Rees* (4); *General Credit and Discount Company* v. *Glegg* (5); *Smith* v. *Olding* (6); *Cripps* v. *Wood* (7); *Lewis* v. *Aberdare and Plymouth Company* (before Mr. Justice *Kay* on the 7th of April, 1884); *Seton* on Decrees (8).]

CHITTY, J.:—

The question in this case is as to the form of the judgment—whether there should be only one period or successive periods limited for redemption?

The Defendants have not put in any defence, and they do not appear at the Bar. The Plaintiff, under the 11th rule of the Order XXVII., is therefore entitled to such judgment as upon the terms of the statement of claim the Court considers him entitled to.

I refer to the claim, and from that it appears that the Plaintiff is mortgagee, or what amounts to the same thing, the transferee of a mortgage, that one of the Defendants is the mortgagor, and then there is a statement that the Defendants, the "*Agnews,*" claim to have some charge upon the mortgage premises, which charge is subsequent to the Plaintiff's mortgage, and that is all that appears in this case. It is not a statement by the Plaintiff that the "*Agnews*" have a charge, merely a statement that they claim to have a charge, and the Plaintiff says that he is entitled therefore to have a decree against them whether they have a good charge or not. There is no admission on the face of the claim that they have a charge. Now, it is undoubted that in a simple case between mortgagor and mortgagee, and where there are no other incumbrances, the mortgagor has, whether he be defendant in a foreclosure action or plaintiff in a redemption action, six months, and six months only, to redeem. I put aside, of course, the cases in which by indulgence he is allowed to come in after default made, and even sometimes in those peculiar cases where, after order absolute, he is allowed to come in, as in *Campbell* v. *Holyland* (1); but the established rule is that a mortgagor has six months and six months only to redeem, and undoubtedly to my mind it is an anomaly to say that a mortgagor by any dealings with the equity of redemption subsequent to the first mortgage should be able to gain for himself a right to a further time to redeem. In a complicated case where the mortgagor has so incumbered the equity of redemption as to give rise to questions of priority, it is clear, and I take it to be settled after the decision in *Bartlett* v. *Rees* (2), by Sir *John Romilly*, which has often been followed, that only one time is allowed for redemption and that is not merely as regards all the persons claiming to be incumbrancers, or shewn to be incumbrancers on the equity of redemption—incumbrancers therefore of the mortgagor; but the mortgagor himself has no further time allowed him to redeem, and there is only one time allowed as against all the defendants. That appears to me, taken in connection with the first simple case I have put, to shew that the mortgagor has no right in himself to more than one period of six months to redeem. If, however, the defendants in a foreclosure action have put in a defence, or appeared at the Bar, and have proved their incumbrances and there is no question of priority between them, it does appear that the course of the Court has been to make a judgment allowing successive periods for redemption, which, when examined in principle, will be found

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(1) 4 Jur. (N.S.) 1044; 28 L. J. (Ch.) 49.

(2) Law Rep. 4 Eq. 537, 547.

(3) 2 Y. & C. Ch. 399, n.

(4) Law Rep. 12 Eq. 395.

(5) 22 Ch. D. 549.

(6) 25 Ch. D. 462.

(7) 51 L. J. (Ch.) 584.

(8) 4th Ed. pp. 1081, 1085.

(1) 7 Ch. D. 166.

(2) Law Rep. 12 Eq. 395.

to be a judgment not only in favour of the plaintiff, but a judgment as between the co-defendants. In order, to my mind, for the Court properly to make such a judgment as that, the defendants must appear, and either prove or have sufficient admission of their incumbrances in order to entitle the defendants asking for it to such a judgment as between the co-defendants. In my opinion, the mortgagor is not entitled to ask at all for such a judgment. It is the right of the puisne mortgagees.

Take the simple case of first mortgagee plaintiff, second mortgagee defendant, and the mortgagor also defendant; it appears to me that if it is desired that there should be a decree, or judgment (to use the modern term) as between the co-defendants, that judgment can only be obtained on the request of the second mortgagee, and he can make that request either when he puts in a defence or upon appearing at the Bar, and proving his deed or offering to prove it, in that event he would have, according to the course of the Court, a right to such a judgment; such a judgment after all is an anomaly, because it is not the judgment which the plaintiff asks for. But it has arisen from the desire of Courts of Equity to do complete justice and to allow the defendants to take the benefit of the action. Under the old practice it was not uncommon for the second mortgagee to institute a cross action asking to be allowed to redeem the first mortgagee, who was plaintiff, and asking for a proper foreclosure and redemption decree over against the mortgagor or the puisne incumbrancers if any there were. But I am satisfied that though it was sometimes done the course of the Court has been to hold that it is not necessary there should be a cross bill (in former times) or cross action (in the present time), but if on the proofs before the Court, or proper admissions made, the second mortgagee's case is set up, then he is entitled to establish his case and to avail himself of the benefit of the action in the manner I have mentioned.

Now applying this principle to the case before me, I have no proof that the Defendants, the "*Agnews*," have in fact any charge upon the property. They do not choose to appear at the Bar and ask me to make a judgment as between the co-Defendants, and under the rule I have already referred to all that I am entitled to do is to make such judgment as the Plaintiff is entitled to. I have said, and I repeat, that the mortgagor, to my mind, has no right whatever in the matter. It would be an absurdity that he should gain a greater right by creating subsequent incumbrances. The result, therefore, is that one time, and one time only, should be allowed to redeem.

I have looked at all the authorities that have been cited, but I do not purpose to go through them; they are not altogether reconcilable. I have consulted many of the Registrars on the subject; they are nearly agreed, and I think they are all agreed to the extent to which I have given my judgment in this case.

There has undoubtedly of late been almost a practice—not thoroughly established—but a tendency to give but one time to redeem. I know the late Master of the Rolls did it in several cases, but those cases are not reported, and it would be too dangerous for me to trust to my own recollection of the circumstances under which he did so. The reason for giving one time only is plain. If I could make an absolute rule upon the matter I think that one time in the present day would be sufficient, because in nearly every modern mortgage there is a power of sale, and besides that the Court has now extensive powers under the *Conveyancing Act* of ordering a sale. In nearly every case in which the mortgagee comes and asks for foreclosure the case is one in which the security is insufficient and he desires to make the best he can of it by converting it to other purposes out of which he hopes to be able to make a profit; but he is unable to do so, so long as there is an equity of redemption which stands in the way and puts him in the difficult position of a mortgagee in possession, or a mortgagee dealing with the property in a manner which renders him liable to some serious responsibility as mortgagee in possession. That is the judgment I give; therefore in this case there will be one time and one time only for redeeming.

It is unnecessary for me to go on to say in this case whether under the liberty to apply, if the mortgagor were to redeem, the second mortgagee could come in and get some further judgment. I leave that question open, with this single observation, that it might be difficult for the second mortgagee on establishing his title to carry on this action, because the judgment seems to be a final one. I leave that point open, and if the mortgagor were to redeem in such a case as the present, there being (I will assume on the facts, although they are not proved) a second mortgagee, such a course would operate for the benefit of the second mortgagee, for he would then become, as between himself and the mortgagor, first mortgagee, because a mortgagor redeeming cannot stand in the mortgagee's place against other incumbrancers. If he has paid off a prior incumbrance he can never set it up as against his own mortgage.

Solicitors: *Field, Roscoe, & Co.*, agents for *Wrigley & Morecroft, Oldham.*

G. M.

CHITTY, J.
1884
July 15.

HAMPDEN *v.* WALLIS.

[1884 H. 670.]

Practice—Order for Payment into Court—Admission—Evidence.

Trust funds may be ordered to be brought into Court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money.

MOTION that the Defendant might be ordered, within four days after service of the order on him, to pay into Court to the credit of this action the sum of £2000, and likewise deposit in Court to the credit aforesaid, 250 Egyptian Unified bonds of the nominal value of £5000, admitted by him to be in his hands as trustee of an indenture of settlement, dated the 3rd of May, 1879, on the marriage of the Plaintiffs.

By this settlement it was recited that the Plaintiff, *A. C. Hobart Hampden*, had transferred 250 Egyptian Unified bonds to *A. E. Tyler* and the Defendant *Wallis*, to be held by them upon the trusts thereinafter declared.

The settlement was executed by the Defendant, but *Tyler* did not execute, and had never acted in the trusts of the settlement.

It was alleged by the Plaintiffs that shortly after the execution of the settlement the 250 Unified bonds and the sum of £2000, also to be held by him upon the trusts of the settlement, were handed over to the Defendant, but that he had refused to render any account of the same to the Plaintiffs, and had not paid any interest to them for some time past.

The action was brought in February last, to obtain an account of the trust property from the Defendant, the removal of the Defendant from the trusteeship of the settlement, the appointment of new trustees, and payment by him, of what should be found due from him on taking the account, to such new trustees.

The statement of claim was delivered on the 3rd of March, and on the 10th of March, 1884, an order was made for an account and inquiry.

On the 22nd of March an order was made on the Defendant for discovery and inspection, and on the 29th of March an order was made upon him for delivery on or before the 16th of April of an account of the trust property comprised in and subject to the trusts of the settlement, with a statement of what had become of such trust property.

On the 8th of April the Defendant delivered a statement of defence, denying the allegations of the statement of claim as to his receipt and possession of the trust funds, but this statement of defence had, pending the present motion, on the application of the Plaintiffs, been struck out.

On the 16th of May, 1884, an order was made by *Chitty*, J., for the attachment of the Defendant for non-compliance with the order for production of documents, but this order was discharged by the Court of Appeal on technical grounds (1).

In support of the present application the Plaintiffs relied upon various admissions contained in letters written by the Defendant. The first of these of the 6th of July, 1879, written to the Plaintiff *A. C. Hobart Hampden* (*Hobart Pasha*), contained the following passage:

" A few days ago, I received a letter from Mrs. *Hobart Hampden*, enclosing a draft from you for £2000, with instructions that the money should be invested and should form part of your marriage portion."

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(1) 26 Ch. D. 746.

On the 12th of January, 1884, he wrote to Plaintiff, Mrs. *Hobart Hampden*:

"I have resolved to write to the Admiral (her husband) to propose that your settlement money should be as soon as practicable, transferred to other trustees, to be invested by them as they think fit."

On the 18th of January, he wrote to Plaintiff, *Hobart Pasha*:

"You will remember, then, that the purchase-money of the house was £10,500 and the costs amount to £660 16*s.*, making a total of £11,160 16*s.* Against this amount I hold £5709."

On the 12th of February, 1884, he wrote to Plaintiff, Mrs. *Hobart Hampden*:

"As regards your money, if your new advisers can hit upon any way by which I can be myself relieved of all responsibilities regarding the house, and have the moneys back which I have expended, I shall be only too willing and ready to cancel everything, and at once, with reasonable notice, pay every farthing of your money to any trustees you may nominate."

A letter from the Defendant to the Plaintiff, *Hobart Pasha*, dated the 28th of May last, also contained the following passages:

"As for the trust moneys, these proceedings have given rise to the question as to whether the £2000 you sent me is trust property at all. Had I not been frustrated in the arrangements I made for locking them up for the three years agreed upon between you and me, this question would probably have never been raised, and the new trustees would have come into possession of the whole without cavil or question. But now it can only be settled by a post-nuptial document, which may be less easy to effect. With regard to the securities, as I have locked them up for the period arranged, if I am compelled to produce cash, then I must go outside and raise it from other resources. I expect to receive nearly double the amount in the course of the next six weeks or two months, in which case you are welcome to the cash and I will stick to the securities. But I object to mention what they are (except that they are within the powers of the settlement), and where they are, until some settlement is made between us, for fear of your solicitors interfering with them and imperilling my arrangements."

With respect to the Egyptian Unified bonds, the Defendant on the 10th of June, 1880, signed the following paper: "I hereby acknowledge to have received from Messrs. *Foster & Braithwaite* the undermentioned securities, £5000 Egyptian Unified bonds and two certificates for unpaid portion of May and November coupons."

The Defendant had made an affidavit upon the present application, denying the receipt and possession of the trust funds, but as he did not comply with an order to attend for the purpose of being cross-examined upon this affidavit, it was rejected.

Whitehorne, Q.C., and *Tremlett*, in support of the motion:—

The recital in the settlement of May, 1879, and the letters of the Defendant before action brought, contain a sufficient admission on the part of the Defendant of the receipt and possession of the trust funds to entitle the Plaintiffs to have them ordered into Court. Formerly there must have been a distinct admission in the defence, but this is no longer necessary so long as the Court is satisfied that the Defendant has admitted having received the money: *London Syndicate* v. *Lord* (1). And in *Freeman* v. *Cox* (2) the affidavit of the plaintiff shewing that defendant had received the money, and service of the notice of motion upon the defendant, were held by *Jessel*, M.R., to be a sufficient admission, "the principle being to make the defendant pay into Court what he does not dispute to be owing from him."

CHITTY, J., referred to *Dunn* v. *Campbell* (M.R. February 1879 (3)).

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(1) 8 Ch. D. 84.

(2) Ibid. 148.

(3) *Dunn* v. *Campbell* was a partnership action, in which it was found by arbitration that the defendant was entitled to £16,000; and in the account of the partnership dealings furnished by the defendant before action brought he made himself out as a creditor for £6000, this result being arrived at by crediting himself with the £16,000. The plaintiff, however, alleged that

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Oswald, for the Defendant :—

The question is whether, on the 17th of June, 1884, the date of service of notice of this motion, there was such an admission on the pleadings of the Defendant's liability to bring the trust funds into Court as to entitle the Plaintiffs to move that the Defendant be ordered to bring the funds into Court upon admission. In every reported case in which such an order has been obtained there has been an admission in the action, or what is equivalent to an admission in the action. Here there is no such admission, but, on the other hand, a statement of defence has been put in, in which the Defendant distinctly denies that he has in his hands the funds inquired for. The Court cannot on motion order money to be paid or stock transferred into Court unless it has a distinct admission of the Defendant that the money is in his hands, or that the stock is in his hands: *Boschetti* v. *Power* (1). Here there is no such distinct admission, but merely a recital in a settlement of 1879, which cannot at this distance of time be relied upon as an admission, and does not touch the £2000, and in any case recites the joint possession of the Egyptian bonds by the Defendant and his co-trustee. As to these letters before action brought, they are nowhere pleaded or relied upon as admissions, are merely stated as exhibits to the affidavit of a managing clerk, and do not in themselves amount to a distinct admission on which the Court can act. Then the admission must be clear and distinct, and the Plaintiffs cannot be allowed to supply any defect, the rule being that the order shall be made upon the Defendant's admission alone: *Daniell's* Chancery Practice (2). In *Freeman* v. *Cox* (3) there was no denial by the defendant on the pleadings, as the order was obtained after the issue of the writ upon the affidavit of the plaintiff, which by the non-appearance of the defendant upon the motion was taken as admitted. The letter of the 28th of May, after action brought, on which the Plaintiffs rely, merely says

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as between himself and *Campbell* the arbitration was *ultrà vires*, and the late Master of the Rolls, adopting this view, deducted the £16,000 from *Campbell's* account, and turned the balance against him so as to make him a debtor to the extent of £10,200, which he was thereupon ordered to bring into Court.

(1) 8 Beav. 98.

(2) 6th Ed. p. 1746.

(3) 8 Ch. D. 148.

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that had he (the Defendant) not been frustrated, all question about the £2000, whether it was trust property at all, might have been settled, which cannot be taken as an admission that the £2000 is held by him on the trusts of the settlement. To make the order in the present case would be going far beyond anything that has been decided in *London Syndicate* v. *Lord* (1), *Freeman* v. *Cox* (2), or *Dunn* v. *Campbell* (3).

CHITTY, J.:—

This is a motion to compel the Defendant to pay into Court a sum of £2000 and deposit in Court 250 Egyptian Unified bonds, based upon admissions not being admissions made in the action.

The first admission is contained in the deed of settlement of the 3rd of May, 1879, in the form of a recital that the Plaintiff had transferred 250 Egyptian Unified obligations into the names of *A. E. Tyler* and the Defendant. That admission is supplemented by an affidavit which shews that *Tyler* did not accept the trusts of the settlement, and that the Defendant is the sole trustee. The execution of the settlement by the Defendant has been proved. In regard to the sum of £2000 there is a plain admission in a letter written before the action that that sum had been received. That sum of £2000 is an additional sum paid by the Plaintiffs to the Defendant to be held upon the trusts of the settlement. There is one letter of the 28th of May, 1884, written subsequently to action brought, the passage on which the Plaintiffs rely being in these terms: "As for the trust moneys, these proceedings have given rise to the question as to whether the £2000 you sent me is trust property at all" [so far there is an admission of receipt]. "Had I not been frustrated in the arrangements I made for locking them up for the three years agreed upon between you and me, this question would probably have never been raised, and the new trustee would have come into possession of the whole without cavil or question. But now it can probably only be settled by a post-nuptial document, which may be less easy to effect with regard to the securities, as I have locked them up for the period arranged. If I am compelled to produce cash, then I must go outside and raise it from other resources." There was an attempt made by the Defendant's counsel to shew that that amounted to a denial, but, as it seems to me, it is an additional admission made after the action.

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(1) 8 Ch. D. 84.

(2) 8 Ch. D. 148.

(3) *Ante*, p. 254, n.

The late Master of the Rolls, in *London Syndicate* v. *Lord* (1), held that one mode of admission was as good as another. The old practice was not to order money into Court unless an admission was to be found in the answer. That practice was modified, and admissions in the proceedings were held to be sufficient. In *Dunn* v. *Campbell* (2), which was a partnership action, it appeared that *Campbell* before action brought (the partnership then being already in dissolution) had delivered an account to the plaintiff which shewed a balance of £6000 due to himself. On this account the late Master of the Rolls ordered *Campbell* to pay money into Court. He went as far as this: he looked at the account, and for the purposes of the motion rejected certain items, and turned the balance against *Campbell*, and ordered him to pay in £10,200. I understand there was some appeal against that order, but nothing came of it. That is a plain decision that it is not necessary that the admission should be in the defence or in the proceedings, and it is a decision which is binding upon me. The late Master of the Rolls also decided in *Freeman* v. *Cox* (3) that where a defendant did not answer an affidavit to the effect that he had received the money, nor appear, there was an admission sufficient for the order. I think, therefore, that it would be right to make the order on the admissions I find in this case. But the matter does not stand there. There has been an order for an account, which brings the case within the decision of the Court of Appeal in the case of *London Syndicate* v. *Lord*, which proceeded on the ground that after a decree the rule was that it was sufficient if there was a probability amounting to a reasonable certainty of not less than a certain amount being due. There is no substantial distinction between an order for an account before decree and a decree for an account. In this case the Defendant has not brought in the account, and there is an attachment out against him in consequence.

(1) 8 Ch. D. 84, 90.
(2) *Ante*, p. 254, n.
(3) 8 Ch. D. 148.

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But the case does not even rest there; there is a further point which is fatal to the Defendant. Pending the motion there has been an order to strike out the defence. That order having been made before the motion was finally disposed of, I think I am entitled to say there is an admission in the pleadings of the allegations contained in the statement of claim. Pending this motion the Defendant asked for time to put in an affidavit. The motion stood over; the Defendant did put in an affidavit, but his counsel, Mr. *Oswald*, very properly admitted that as he had not attended, though ordered to do so, for the purpose of cross-examination, it cannot be entered as read. The result is that in all these circumstances there is a sufficient admission, and the order asked for must be made.

Solicitors: *Eardley-Holt & Richardson; Eldred & Bignold.*

F. G. A. W.

CHITTY, J.
1884
July 19, 26.

STRUGNELL *v.* STRUGNELL.

[1884 S. 2718.]

Practice—Partition Act, 1868 (31 & 32 *Vict. c.* 68), *s.* 8—*Sale out of Court.*

Where some of the parties beneficially interested are not *sui juris*, and the trustees have no power of sale under their trust deed, there is no jurisdiction under the *Partition Act*, 1868, s. 8, to order a sale out of Court.

PARTITION ACTION.

The property, consisting of a freehold house, was devised in trust for six persons, of whom four were infants, and the will did not give the trustees any power of sale. The Plaintiffs were one of the adults and the four infants beneficially interested, and the Defendants were the two trustees, one of whom was also beneficially entitled to the remaining sixth.

At the hearing a sale was asked for (the infants making the request by their next friend), and it was also asked that the trustees might be at liberty to conduct the sale out of Court, and hold the proceeds upon the trusts of the will.

The order having been made in this form, the Registrar refused to draw it up, on the ground that there being infants interested and no power of sale, the Court had no jurisdiction to direct the sale to be conducted out of Court.

E. Ford supported the order, and referred to *Chubb* v. *Pettipher* (1), where an order similar to that asked for in the present case was made by Vice-Chancellor *Malins.*

The Registrar called the attention of the Court to *Baker* v. *Baker* (2), where Vice-Chancellor *Hall* declined to follow *Chubb* v. *Pettipher;* and to *In re Harvey's Settled Estate* (3), where Vice-Chancellor *Hall* held that the Court, where some of the parties beneficially interested were infants, had no jurisdiction to direct a sale under the *Settled Estates Act,* 1877, to be conducted out of Court.

Arkcoll, for the Defendants.

Chitty, J., agreed with Vice-Chancellor *Hall* in holding that the Court had no jurisdiction to direct a sale to be conducted out of Court where infants were interested. To permit a sale to be conducted out of Court would be tantamount to giving the trustees a power of sale, although the testator had given no such power. If there were no trustees, would the Plaintiffs be allowed to sell out of Court? Certainly not; and the reasons for not allowing a plaintiff so to sell would apply to trustees without a power of sale. It was to be observed that a sale under the Court did not much increase the expense, and the late Master of the Rolls used to observe that any additional expense was more than compensated for, and that it was worth while selling under the Court, as a better price was got. The infants were entitled to the protection of the Court, and, following *Baker* v. *Baker,* he was of opinion that he had no power to order a sale out of Court. The order for a sale by the Court in the usual way must be made, and the proceeds paid into Court.

Solicitors: *Gosling, Ingleby & Boak.*

F. G. A. W.

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(1) *Seton* on Decrees, 4th Ed. p. 1009.

(2) Unreported (10th of May, 1879).

(3) 21 Ch. D. 123.

PEARSON, J.

1884

May 2, 3.

WITTMAN *v.* OPPENHEIM.

[1884 W. 1235.]

Copyright—Registered Design—Article erroneously marked—Patents, Designs, and Trade-marks Act, 1883 (46 *&* 47 *Vict. c.* 57), *ss.* 51, 113—*Designs Rules,* 1883, *r.* 32—*Costs—Innocent Infringer—Notice before Action.*

Sect. 51 of the *Patents, Designs and Trade-marks Act,* 1883, applies to the delivery on sale of articles to which a design registered under the Act 5 & 6 Vict. c. 100, has been applied, and the marking of such goods since the Act of 1883 came into operation is regulated by that Act. Consequently, the proprietor of a design registered under the Act 5 & 6 Vict. c. 100, is in a proper case entitled to the benefit of the proviso contained in sect. 51, which relieves him from the forfeiture of his copyright resulting from the omission to mark the articles with the prescribed mark, if he shews that he "took all proper steps to ensure the marking."

The proprietor of a registered design instructed the manufacturer, who made for him the articles to which the design was applied, to stamp the proper mark upon them, and furnished him with a die for the purpose. By inadvertence the manufacturer marked some of the articles with a mark which belonged to another design registered by the same proprietor, the copyright of which had expired, using for the purpose by mistake an old die which remained in his possession, and the proprietor, after the Act of 1883 came into operation, sold some of the articles thus wrongly marked without observing the error. The letters Rd. formed part of both the marks:—

Held, that the proprietor had not forfeited his copyright, but that he was protected by the proviso in sect. 51.

Held, that an innocent infringer of a registered design must pay the costs of a motion for an injunction to restrain him from infringing, though the Plaintiff had given him no notice of the infringement before serving him with the writ in the action.

Upmann v. *Forester* (1) followed.

THIS action was brought to restrain the Defendant from infringing the Plaintiffs' copyright in a registered design for a china lamp, known as the "Owl" lamp.

The Plaintiffs registered their design on the 29th of July, 1881, under the provisions of the Act 5 & 6 Vict. c. 100, which was then in force, the number on the register being 367,544.

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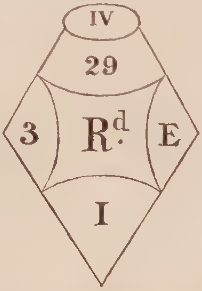
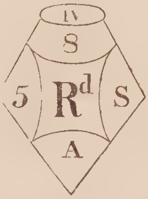
(1) 24 Ch. D. 231.

The mark mentioned in the certificate of registration as to be affixed to the lamps was in this form—



On receiving the certificate of registration the Plaintiffs had a metal die bearing the mark constructed, for the purpose of stamping the mark on the lamps which were to be manufactured according to the design, and they sent the die to a firm of manufacturers in *Germany*, who made the lamps for them, with directions to affix the mark to all the "Owl" lamps which they should make for them.

The German firm by mistake, affixed to some "Owl" lamps which they sent to the Plaintiffs early in the year 1884, the following mark



This mark had been registered by the Plaintiffs on the 8th of December, 1880, on their registering a different design for a china menu stand, which the German firm also manufactured for them. The copyright of that design expired on the 8th of December, 1883, but the die for the stamping of the mark remained in the possession of the German firm, and it had been inadvertently used instead of the proper one in stamping the "Owl" lamps.

The Plaintiffs now moved for an injunction. They deposed that they had sold large quantities of the "Owl" lamps, and that to the best of their belief, until the consignment which they received from *Germany* at the beginning of 1884, all the lamps had been stamped with the proper mark, and they said that they did not know, until they read an affidavit filed by the Defendant in opposition to the motion, that the lamps consigned to them at the beginning of 1884 had been wrongly marked. They said that they did not examine the details of the mark, believing that their order had been properly carried out by the German firm. The Plaintiffs admitted that they had sold some of the lamps which had been thus wrongly marked, but they said that they should not have done so had they known that a wrong mark had been affixed to them.

The Defendant deposed that when he sold the lamps which were alleged to be an infringement of the Plaintiffs' design, he believed that the design was an old one, and was not aware of the existence of any copyright in it. He said that he had sold only six of the lamps to the public. No notice was given by the Plaintiffs to the Defendant that he was infringing their design before the writ was served on him.

Willis-Bund, for the Plaintiffs:—

We are entitled to the benefit of the proviso at the end of sect. 51 of the *Patents, Designs, and Trade Marks Act* of 1883 (1).

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(1) Sect 3. "This Act, except where it is otherwise expressed, shall commence from and immediately after the 31st day of December, 1883."

Sect. 50 (1) "When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration."

Sect. 51. "Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words or figures, denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shews that he took all proper steps to ensure the marking of the article."

Sect. 113. "The enactments described in the 3rd schedule to this Act are hereby repealed. But this repeal of enactments shall not—

"(*a*) Affect the past operation of any of those enactments, or any patent or copyright, or right to use a trade-mark, granted or acquired, or application pending, or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of this Act; or

"(*b*.) Interfere with the institution

We "took all proper steps to insure the marking of the articles," and we ought not to suffer from the accidental error of our manufacturers. This proviso was inserted to carry out the view expressed by the Queen's Bench Division in *Fielding* v. *Hawley* (1), and the present is just the kind of case to which it was intended to apply. The old Acts are entirely repealed, and the marking of articles made according to registered designs is regulated entirely by the Act of 1883. Sect. 113 saves only rights existing at the date of the repeal; it does not apply to anything done after the Act of 1883 came into operation. The material parts of the mark are the letters "Rd.," and the number which shews the class of goods, and both these appear in the mark which was

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or prosecution of any action or proceeding, civil or criminal, in respect thereof, and any such proceeding may be carried on as if this Act had not been passed; or

"(*c.*) Take away or abridge any protection or benefit in relation to any such action or proceeding."

Sect. 114 (2). The registers of designs and of trade-marks kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of designs and the register of trade-marks kept under this Act."

Among the enactments mentioned in the 3rd schedule are the Act 5 & 6 Vict. c. 100 (1842), relating to copyright of designs for ornamenting articles of manufacture, and the subsequent Acts amending it. By that Act the protection given by registration of a design lasted for a period of three years only, and by sect. 4, "No person shall be entitled to the benefit of this Act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture" unless (*inter alia*) "after publication of such design every such article of manufacture . . . to which the same shall be so applied, published by him, hath thereon, if the article of manufacture be a woven fabric for printing, at one end thereof, or if of any other kind, . . . at the end or edge thereof, or other convenient place thereon, the letters "Rd," together with such number or letter, or number and letter, and in such form as shall correspond with the date of the registration of such design according to the registry of designs in that behalf."

There was no proviso in this section similar to that at the end of sect. 51 of the Act of 1883.

By rule 32 of the *Designs Rules*, 1883 (made under the Act of 1883), "Before the delivery on sale of any article to which a registered design has been applied, the proprietor of such design shall, if such article is included in any of the classes 1 to 12 in the 3rd schedule hereto, cause each such article to be marked with the abbreviation "Rd.," and the number appearing on the certificate of registration."

In the 4th class in the 3rd schedule are included "Articles composed wholly or partly of glass, earthenware, or porcelain."

(1) 48 L. T. (N.S.) 639.

wrongly stamped on the lamps; there is enough to indicate the fact of registration.

Levett, for the Defendant:—

A wrong mark is misleading; a reference to the register would shew that the registration had expired. Sect. 51 does not apply to a design which has been registered under the old Acts; in such a case the provisions of those Acts were preserved by sect. 113. If the construction of that section which is suggested is right, it would follow that the protection has been extended in the case of designs registered under the old Acts from three years to five years.

[PEARSON, J.:—I do not think that would be so.]

It was not intended by the new Act to extend the rights of proprietors who had already registered. On the evidence, it is not clear that the wrong mark was put on after the new Act came into operation; the fair inference is that it was done before. But, if sect. 51 applies at all to a design registered under the old Acts, the proviso does not apply to such a case as the present. It was intended only to provide against mere accidental errors; not to relieve from the consequences of carelessness. The Plaintiffs have not used due diligence. They should have taken care to have the old die destroyed after the expiration of the registration of the design to which it belonged. They should have examined the lamps when they received them from the manufacturers and have ascertained that they were properly marked. The Plaintiffs did not give the Defendant the notice required by sect. 7 of the Act of 1842, not to use their design.

Willis-Bund, in reply:—

The Defendant made no inquiry whether the design was protected until after proceedings had been commenced against him by the Plaintiffs. If he had inquired at the registry office he would have found that it is protected: sect. 53. Section 113 saves only existing rights and pending proceedings; it does not apply to anything done after the commencement of the new Act. A slip made by a workman is within the proviso in sect. 51.

[PEARSON, J.:—Suppose by some carelessness no mark at all had been stamped on the articles, could the proprietor then say that he had taken all proper steps to insure the marking?]

That is not the present case. The proviso is a relieving one, and it should be construed liberally. The actual date of the marking is not material; the material time is the time of the "delivery on sale."

The Defendant ought to pay costs. The new Act does not require that any notice shall be given before proceedings are taken in respect of the infringement of a registered design. An innocent infringer will be ordered to pay costs: *Upmann* v. *Forester* (1). The Defendant did not when the writ was served on him make any offer to submit.

Levett:—The evidence shews that an offer was made.

PEARSON J:—

The ground of the Plaintiffs' application is that their design for a lamp is protected by the *Designs Act*, and that the Defendant has infringed their rights. The defences which are set up are these, first that the statutory provisions have not been complied with, and that such protection, if any, as did exist, has ceased and been lost by reason of the proper mark not having been stamped on the article in question in accordance with the Act. Some questions arise upon the new Act, which I fear I must decide, although they are by no means so easy to decide as questions upon the construction of an Act of Parliament ought to be. It appears that on the 8th of December, 1880, the Plaintiffs registered a design for a china menu stand; the protection of that design expired on the 8th of December, 1883. On the 29th of July, 1881, they registered another design for a china lamp, and that registration is still in force. Under the old Act the copyright of that design would have expired on the 29th of July, 1884, and I need not inquire whether it possesses any greater longevity now, because I am only asked for an injunction extending to that date. Now sect. 4 of the old Act required that the prescribed mark should be put on every article of manufacture to

(1) 24 Ch. D. 231.

which the registered design was applied, otherwise the copyright was irretrievably lost and no proceedings could be taken in respect of it against any person using the design. Under the Act of 1883, there is in effect the same obligation to stamp the prescribed mark on the articles before their delivery on sale; and if this is not done, the copyright is forfeited, subject, however, to this remarkable saving clause or proviso, "unless the proprietor shews that he took all proper steps to ensure the marking of the article."

The first contention of the Defendant is this. It is said that, inasmuch as the copyright was acquired under the old Act, that saving clause does not apply at all, and I must deal with the case as if the new Act had not been passed. Now sect. 113 of the new Act repeals the Act of 1842 entirely, but it contains a saving clause on which the Defendant's counsel relies. But, notwithstanding all the multiplicity of the wording of that clause, I cannot help seeing that it is intended to apply to that which has been done in the past, not to that which is to be done in the future and, consequently, by the repeal of the old Act, the necessity for marking articles made according to a design registered under the old Act would be gone altogether, unless sect. 51 of the new Act applies to the delivery on sale of such articles after that Act came into operation. If sect. 51 does not apply to sales of such articles after the new Act came into operation, there is no obligation to mark such articles at all. I think it was the intention of the Legislature to continue that obligation, and I do not see how it can exist unless it arises under sect. 51 of the new Act. I think, therefore, that sect. 51 was intended to apply to sales after the new Act came into operation of articles manufactured according to designs registered under the old Act, and that, consequently, the proviso or saving clause of sect. 51 applies to the present case. I am confirmed in this view by the language of some of the sections and rules, which in terms refer to registration in the past. On the whole I come to the conclusion that the marking of the articles must now take place under sect. 51 of the new Act, and therefore the saving clause in that section applies.

The next question is what is the meaning of the words "unless the proprietor shews that he took all proper steps to insure the marking of the article." I can understand that this proviso would hit the case of the marking being imperfect, deficient, for instance, in a number or part of a number. But in a great many cases which might arise I should find it far more difficult to decide what the words meant, and I hope that it may fall to the lot of some other judge than myself to deal with such cases when they arise. Taking the words literally, they would extend to such a case as this—if the proprietor of a design employed a manufacturer to make a large quantity of the articles for him, and gave him directions to put the proper mark on them, and the manufacturer omitted to put any mark at all on them—I do not intend to decide the point now, it is not necessary that I should do so, but—so far as I can see at present, the whole of those goods might be sold in the market without any mark at all and yet the copyright would not be forfeited, if the saving clause is to be read literally.

But I must consider what is the nature of the mark which has been put on these goods. It appears that the Plaintiffs' goods are manufactured in *Germany*, and that they instructed the manufacturers to mark the lamps with a die which they sent them for that purpose. By some blunder the manufacturers used the die belonging to another design of the Plaintiffs the copyright of which had expired. But I find that that old mark contained the letters "Rd," which to my mind is the principal feature of the mark, and which would give notice to all the world that the design purported to have been registered. Anyone who made inquiry at the Registry would have been able to learn everything about the registration. It is not like the case of there being no mark at all upon the goods, in which case there would have been no notice that the design was registered; there is distinct notice of an assertion that it was registered. If the Defendant chose to use the design without making any inquiry, he ran the risk willingly. It is in fact clear to me that at first the Defendant had no idea that he could dispute the validity of the Plaintiffs' registration, and that his present contention is the result of subsequent inquiry and advice.

At the same time I am satisfied that there has been no *mala fides* whatever; I think that the Defendant in no way intended to act dishonestly. The only questions are whether I ought to

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grant an injunction, and, if so, whether I shall order the Defendant to pay costs. I should be very willing to make no order as to costs, but, looking at the decision in *Upmann* v. *Forester* (1), and to the rule as there stated by *Chitty*, J., with which I entirely agree, I am afraid I have no choice. It is said that the Plaintiffs issued their writ without notice to the Defendant, and that the Defendant, as soon as he had notice of the Plaintiffs' title, did his best to undo what he had done. But, at the same time, I cannot say that the Plaintiffs were wrong in issuing their writ without notice, and after that the only offer which the Defendant could properly make was to submit to an injunction and pay the costs.

Solicitors for the Plaintiffs: *Lockyer & Dinn.*
Solicitors for the Defendant: *Halse, Trustram & Co.*

W. L. C.

PEARSON, J.
1884
May 9.

TAYLOR *v.* PILSEN JOEL AND GENERAL ELECTRIC LIGHT COMPANY.

[1884 T. 568.]

Purchase by Company of its own Shares—Reduction of Capital—Power to alter Articles of Association—Resolution effecting two Objects.

A company having formed a scheme for reducing their capital by the purchase of fully paid shares, and this being in violation of their articles of association, passed a resolution at a general meeting: "That notwithstanding any thing contained in the articles, the directors be authorized to carry out the following compromise or modification of the agreement with the vendors," which was in effect to cancel 12,000 fully paid vendors' £5 shares upon payment of £1 3*s.* 4*d.* per share:—

Held, that this resolution was valid, notwithstanding that the effect of it was to carry out two distincts objects, viz., to set aside for the purpose of this transaction the article forbidding the purchase of shares, and to authorize the directors to carry out the proposed scheme.

Imperial Hydropathic Hotel Company v. *Hampson* (2) discussed and explained.

Campbell's Case (3) followed.

THIS was a motion on behalf of the Plaintiff for an injunction to restrain the Defendant company from applying any part of their assets to the purchase of their own shares, and in particular from applying money of the company in payment of a sum of £1 3*s.* 4*d.* per share, or any other sum, for the surrender or acquisition of fully paid-up shares, as proposed or expressed to be authorized by a resolution passed at an extraordinary meeting of the company on the 6th of March last. The capital of the company, as stated in the memorandum of association, was £200,000 divided into 40,000 shares of £5 each, all of which had been issued. Of the said shares, 12,000 had been issued to the vendors or their nominees as fully paid-up shares, and the remaining 28,000 had £2 10*s.* credited as called up. Owing to the depression in electric lighting business the company had failed to realize by sale of concessions and otherwise the results which had been anticipated at the time the purchase-money of its patents had been fixed, and the vendors, the *Union Electric Light and Power Company*, were willing to make some compromise of the original agreement of purchase, whereby they should receive instead of £60,000 in fully paid £5 shares, a sum of £14,000 in cash, this amounting to £1 3*s.* 4*d.* per share. It was further considered desirable by the owners of part paid shares in the company to get rid of the fully paid shares; inasmuch as in the case of a winding-up it would otherwise be necessary to call up the whole uncalled capital in order to redistribute it *pro ratâ* with the other assets of the company amongst the whole body of shareholders, fully paid and part paid. On proceeding to carry out the above scheme of compromise, it transpired that 470 of the 12,000 fully paid shares had been disposed of at their full value, and the Plaintiff was the holder of 250 of such shares. The special resolution passed by the company, and of which he complained, was to the following effect: "That notwithstanding anything contained in the articles of association, the directors be authorized and directed to carry out the following compromise and modification of the agreement with the vendors, the *Union Electric Light and Power Company*, that is to say, that the directors shall take a surrender of the 11,530 fully paid-up £5 vendors' shares which were allotted to the *Union Electric Light and Power Company* in consideration of the purchase, and of such of the 470 like shares allotted to their nominees as can be obtained, and that the directors do pay in lieu and consideration thereof a sum not exceeding the amount of £1 3*s.* 4*d.* for each of such shares, and that as hereby modified the said agreement with the vendors be confirmed.

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(1) 24 Ch. D. 231.
(2) 23 Ch. D. 1.
(3) Law Rep. 9 Ch. 1.

It was further resolved—

(2.) "That if an order of the Court be obtained for confirming this resolution, the capital of the company be reduced as follows:—

(1.) "By cancelling the 12,000 fully paid-up vendors' shares as and when the same shall be surrendered pursuant to the foregoing resolution, or such of the said shares as shall be surrendered.

(2.) "By cancelling the sum of £1 per share on the 28,000 shares in the company with £2 10*s.* called up thereon, and also on any fully paid-up vendors' shares which may not be so surrendered as aforesaid, as being capital which has been lost, or is unrepresented by available assets.

(3.) "By reducing the amount liable to be called up on the 28,000 shares with £2 10*s.* called up thereon, from the sum of £2 10*s.* per share to £1 10*s.*

And that the memorandum of association of the company be modified so as to carry into effect this resolution."

The date of the original agreement for the purchase of the company's patents, of which this scheme proposed to effect a compromise or modification, was the 9th of May, 1882.

The first of the objects of the company, as defined by its memorandum of association, was "to adopt and carry into effect either with or without modification" the aforesaid agreement. By the 30th of the company's articles of association it was provided that "the directors, on behalf of the company, may accept the surrender of any shares in respect of which all calls made at the time of such surrender shall have been paid, provided that no money paid or credited upon the shares be paid or refunded by the company." By art. 83 the directors were authorized "to invest the funds of the company in such securities as they may deem fit, provided that no part of the property of the company shall, under any circumstances, be invested in the purchase or lent on the security of shares or stock of the company." By art. 84 "the directors shall not invest or expend any money of the company, whether carried to the reserve fund or not, in the purchase of shares or stock of the company."

The company had power under its articles to reduce its capital.

Cozens-Hardy, Q.C., and *Beale*, for the Plaintiff:—

What we say is that the resolution passed by the company is an attempt to purchase the shares of the company out of their own money, and this is *ultrà vires*. There is a power in the directors to accept shares which may be surrendered, but a company cannot take power to purchase its own shares.

[*Davey*, Q.C.:—That was decided the other way in *In re Dronfield Silkstone Coal Company* (1).]

Then we say that although there is power for a general meeting to cancel any one of the existing articles of association, and to make a new one in its place, this resolution is not effectual for such a purpose. There was no notice in convening the meeting that it was intended to cancel one of the articles —the terms of the notice are "that notwithstanding anything contained in the articles of association," but there is no distinct notice of a proposal to alter the articles. In the case of the *Imperial Hydropathic Hotel Company* v. *Hampson* (2), which is very similar to this case, Lord Justice *Cotton* said (3): "it would be evidently most unreasonable to say that in such a case all these shareholders are not to have notice that this is an alteration in the regulations." It was decided in the *Imperial Bank of China* v. *Bank of Hindustan* (4) that acquiescence, in order to bind all members of a company to a bargain which there is no power to confirm, must be acquiescence by every member of the company, and that there must be distinct notice of the intention to repeal the articles.

There ought to have been one resolution to alter the articles, and another proceeding under them as altered, and that course not having been pursued, the proceedings are invalid. Lord Justice *Cotton* distinguishes *Alison's Case* (1) (by which he presumably refers to *Campbell's Case* (2)) from the *Hydropathic Hotel Case* (3), and of the two, our case is nearer to the latter; of which he says (4): "that it was simply an attempt, without altering the rules for the purpose, to remove a director, his removal being, unless there is a general alteration, an illegal act . . . *ultrà vires* and not supported by any regulation of the company," that is the case here.

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(1) 17 Ch. D. 76.

(2) 23 Ch. D. 1.

(3) 23 Ch. D. 11.

(4) Law Rep. 6 Eq. 91.

Davey, Q.C., and *Rawson*, for the company:—

Lord Justice *Cotton* could not have intended to overrule *Campbell's Case*, which has been frequently followed: *Teasdale's Case* (5). The very point raised by the Plaintiff was dealt with by Lord *Selborne* in *Campbell's Case* (6). He says (7) that the view of the Lord Chief Baron that the resolution was bad as attempting to combine *uno flatu* two operations, *hæret in cortice*, and loses sight of the substance.

On the question of notice Lord *Selborne* says (7), "All the shareholders must have imputed to them knowledge . . . . of their own memorandum and articles of association, and of the fact that the articles did not authorize the proposed increase of capital."

The case of the *Imperial Hydropathic Hotel Company* v. *Hampson* is different from ours; for there it was impossible for the company to argue that they had duly altered their articles by the resolution as passed, because sufficient notice was not given as required by their 45th article. The removal of the directors was attempted to be effected by additional resolutions of which only three days' notice had been given under the 46th article (8). Therefore though the notice might have been sufficient in the case of an ordinary resolution, it was not sufficient when the object was to repeal or alter the regulations of the company. This view is supported by what the Master of the Rolls says (9), that "the

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(1) Law Rep. 9 Ch. 24.

(2) Ibid. 1.

(3) 23 Ch. D. 1.

(4) Ibid. 12.

(5) Law Rep. 9 Ch. 54.

(6) Ibid. 19 *et seq.*

(7) Ibid. 22.

(8) 23 Ch. D. 4.

(9) 23 Ch. D. 9.

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resolution passed at the first meeting was passed on a bad notice;" and Lord Justice *Bowen* (1) says, "It seems to me that as regards the first meeting the Appellants are out of Court," and it is not inconsistent with Lord Justice *Cotton's* judgment (2), "Now, in my opinion, it is an entire fallacy to say that because there is a power to alter the regulations, you can, by a resolution which might alter the regulations (that must mean if it had been duly passed, and upon sufficient notice) do that which is contrary to the regulations as they stand in a particular and individual case." It would be most unreasonable to require the company, first to alter its articles in order to carry out this scheme, and then to alter them back again to their original state. There is no intention of retaining a power to purchase the company's shares.

Cozens-Hardy, in reply:—

Campbell's Case (3) was on the 12th section of the Act of 1862. This scheme is under sect. 50.

PEARSON, J.:—

The question on this motion is really whether or not in that which has been done in the passing of a special resolution at a meeting of this company, the company have complied with the articles of association and with the Act of Parliament, or whether the resolution is insufficient for the purposes for which it was intended. It appears that in this company there were, amongst others, 12,000 shares treated as fully paid-up shares, which I gather had been originally given to the vendors as a part of the consideration for the purchase of the patents under which the company is worked. Some time before the passing of the resolution there seems to have been a discussion in the company with regard to these 12,000 shares. It appears that the owners of part paid shares in the company thought these 12,000 shares objectionable and desired to get rid of them. Accordingly a scheme was formed by the company, and was presented to the board of directors, under which the 12,000 shares were to be cancelled on payment to the proprietors of them of £1 3*s*. 4*d*. per share. Of course that required the assent of the holders of those shares. The whole thing seems to have been conducted fairly and honestly, without any secrecy of any sort or description, and notice having been sent suggesting that this scheme should be adopted, I gather from the resolution that out of the 12,000 holders 11,530 consented to accept the £1 3*s.* 4*d.* Though, however, the scheme was a proper scheme, and a very large majority of those who held the fully paid-up shares were willing to come into it, there stared them in the face certain articles of association forbidding the company to purchase any of their own shares, and as long as those articles stood it was impossible for the directors to give effect to this part of the scheme.

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(1) 23 Ch. D. 13.

(2) 23 Ch. D. 11.

(3) Law Rep. 9 Ch. 1.

There is another part of the scheme which cannot be carried into effect without the assent of this Court. I merely mention that to shew that I have not forgotten it, but I consider at the present moment I have nothing to do with that. It may be that eventually the whole of the scheme will fail, because it cannot be carried through in its entirety. All I have to decide to-day is, aye or no, have the directors successfully carried through so much of their scheme as relates to the authorization to them to buy up these 12,000 shares at the price mentioned?

They give, therefore, notice of their proposed intention by issuing a circular in which they describe the scheme, and they say this: "The details of the scheme having been carefully considered by the directors, they are of opinion that it is decidedly advantageous for all classes of the shareholders, and they therefore recommend the shareholders to adopt it at the meeting of which notice is enclosed, and to pass the resolutions accompanying the notice, which have been framed for carrying out the scheme." This was due notice to the shareholders that the directors had not the power of carrying out the scheme themselves until certain special resolutions had been passed by the meeting to give them that power. The resolution that was passed was in these words: [His Lordship read the resolution already set out.] Now the first objection made to this resolution is this, that it does not in terms repeal the articles forbidding the directors to purchase the shares, and it is said that, until those articles were repealed, the directors would have no power to do so; and I

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suppose, therefore, the contention is, that, strictly speaking, the order of proceeding ought to have been this: First, a resolution repealing that article; secondly, a resolution when the article was repealed authorizing the directors to purchase these shares; and thirdly, another resolution re-enacting the same article with regard to the shares then remaining in the company. If that had been done I cannot imagine that any of the objections which I have heard to-day could have been taken to the resolution so passed. But, it is said there is no resolution here repealing the article at all. I differ from that. After all I have heard I remain of the opinion which I threw out during the argument, that this resolution is framed purposely to shew, as regards the purchase of these 12,000 shares, that the articles forbidding their purchase were to be repealed, because it begins with these words: "That notwithstanding anything contained in the articles of association the directors be authorized."

The meaning of that is this, there is something in the articles of association which stands in the way at the present moment, and that has to be put on one side in order to enable that to be done which the resolution proposes to be done. I cannot imagine myself that it could be said seriously that you want two resolutions to do that, and that you could not explain in one resolution both matters; that is, that you might not have said that article so-and-so be repealed and that the directors be at liberty to do something else, in one resolution. No doubt there would be two terms in that resolution, but there was no reason that I can see why these two terms might not be contained in one resolution, and substantially I am of opinion that they are contained in this resolution; therefore if it was necessary to repeal the article in order to enable the purchase of these shares, by the terms of this resolution and within the comprehension of all persons to whom this notice is given, that article is to that extent by this resolution set on one side. I should have thought so if I had never heard of *Campbell's Case* (1), but I confess that the authority of that case seems to me to run on all fours with this. I entirely agree with Mr. *Hardy* that there is a certain amount of difference between the

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(1) Law Rep. 9 Ch. 1.

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cases, but I say whatever difference there might be between the two cases is, to my mind at all events, removed by the terms of the resolution, which is not only that the 12,000 shares are to be purchased, but that they be purchased notwithstanding anything contained in the articles of association. Then it is said that I am bound by the authority of the *Imperial Hydropathic Hotel Company* v. *Hampson* (1). I perfectly admit I am bound by that case. I do not conceive that case to be the same as the present one. In the first place, as I understand that case, and I think Mr. *Rawson's* argument upon that is right, it was impossible in that case to rely upon the resolution as altering the articles because no proper notice was given under the regulations of the company (2) of an intention to alter the articles at all. What Lord Justice *Cotton* says (3), is this: "Assuming, as I do for the present purpose, as the second meeting seems to have been regular according to the notice, that everything was regularly done, what was done cannot be treated in my opinion as first an alteration of the regulations, and then under that altered regulation as a removal of the directors." Looking at another part of his judgment, I think that what he points out is this: You cannot find in this resolution any intention whatever to alter the regulations. The simple resolution was a resolution that *A.* and *B.* be removed from being directors, and therefore if you were to formulate that into a resolution it would be, not a resolution that power be given to the company to remove the directors, but that power be given to remove *A.* and *B.*, and no more. What he says, therefore, is, that it never was the intention of the parties to alter the regulations but simply to remove those two directors, and the power to do so they did not possess. I think, therefore, that that case does not fully cover the present one. I am of opinion that in this case the resolution expressed most plainly an intention to set on one side the article forbidding the purchase of these shares, and to authorize the directors to purchase the shares. It seems to me, if I may use Lord *Selborne's* expression, a matter of absolute indifference whether that was done *uno flatu* or not.

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(1) 23 Ch. D. 1.

(2) See Arts. 44, 45, 23 Ch. D. 2, 3.

(3) 23 Ch. D. 11.

Another technical objection taken by Mr. *Hardy* to this resolution was this: He says it is incorrect and misleading to call the scheme a compromise and modification of the agreement with the vendors. To my mind there is nothing in that objection. The 12,000 shares, as I understand, were originally the vendors' shares, and what was proposed to be done therefore was this—whereas the vendors were under the agreement to receive 12,000 fully paid-up shares, they now say let the agreement stand, as if it were that they were to receive 12,000 times £1 3*s.* 4*d.*, and that is the whole of it. So far from shewing any obscurity, it only expressed and gave more clear notice to the shareholders of that which the parties were about to do. I think under these circumstances the resolution was perfectly sufficient, that the authority was properly given to the directors, and that I must therefore refuse this motion with costs.

Rawson asked that this motion might be treated as the hearing of the action.

Cozens-Hardy, Q.C., did not object to that application if it were not made a consent order.

PEARSON, J.:—

Very well. I treat this as the trial of the action, and dismiss it with costs.

Solicitors: *Cunliffe, Beaumont, & Davenport*; *Parker, Garrett, & Parker.*

T. W. G.

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1884

May 10.

In re OLATHE SILVER MINING COMPANY.

Company—Winding-up—Creditor's Petition—Debenture-holder—Trust Deed—Debenture payable to Bearer—Debenture held as Security—Inquiry as to existence of Assets—Appointment of Provisional Liquidator with Powers of Official Liquidator—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 86, 92 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 223.]

A company issued debentures payable to bearer, the payment of which was secured by a deed by which the company purported to assign all their present and future property to trustees, on trust for the benefit of the debenture-holders, and covenanted with the trustees for payment of the principal and interest of the debentures. By the debentures the company agreed to pay the amount thereby secured to the bearer:—

Held, that the holder of some of the debentures, the interest on which was overdue (the debentures having been deposited with him by the original holder as security for a debt) was entitled to petition for the winding-up of the company.

In re Uruguay Central and Hygueritas Railway Company of Monte Video (1) distinguished.

There being some evidence that the company had no assets beyond the property comprised in the trust deed, the Court directed an inquiry in Chambers whether the company had any and what assets not included in the deed and available for the general creditors, and referred it to Chambers to appoint a provisional liquidator, with all the powers of an official liquidator, but the liquidator was to take no steps without the direction of the Judge in Chambers, beyond taking possession of the company's property within the jurisdiction, including their books and papers.

THIS was a petition for the compulsory winding-up of the *Olathe Silver Mining Company*. The Petitioner was the holder of eighty debentures of the company of £10 each, the interest on which was in arrear. The company was registered in May, 1881, under the *Companies Acts*, as a company limited by shares, the nominal capital being £150,000, in shares of £1. Only 11,971 shares were issued to the public. The company was formed to acquire, by purchase or lease, lands and mining rights and properties in *Colorado* or elsewhere. The company acquired some silver mines in *Colorado* at the price of £100,000, which was to be paid for partly in cash and partly by the issue of fully paid-up shares to the vendor. In August, 1882, the company resolved to issue mortgage debentures to the amount of £25,000, in debentures of £10 each.

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(1) 11 Ch. D. 372.

These debentures were headed "Mortgage Debenture," and were (omitting merely formal parts) as follows: "The company will on the 1st day of August, 1885, or on such earlier day as the principal moneys hereby secured shall become payable, in accordance with the conditions indorsed hereon, pay to the bearer of this debenture the sum of £10. And the company will in the meantime pay interest thereon at the rate of £8 per cent. per annum, by equal half-yearly payments, on the 1st day of February and the 1st day of August in each year, in accordance with the coupons annexed hereto, the first of such half-yearly payments to be made on the 1st day of February, 1883. This debenture is issued upon and subject to the conditions indorsed hereon."

Among the indorsed conditions were the following:—

"1. This debenture is one of a series of debentures issued or to be issued by the company for securing principal sums not exceeding in the aggregate £25,000. The debentures of the said series are to rank *pari passu* in point of charge, without any preference or priority one over another."

Condition 2 enabled the company to pay off the debentures by giving three months' notice, and provided that the principal money would also become payable if an order to wind up the company should be made, or a special or extraordinary resolution passed for a winding-up.

"3. Annexed to this debenture are six coupons, each providing for the payment of a half-year's interest, and such interest will be payable only on presentation and delivery of the coupon referring thereto.

"4. The bearer of the debenture and the bearer of each of the said coupons, will be entitled to the principal moneys and interest specified in such instruments respectively, free from any equities between the company and the original or any intermediate holder thereof respectively."

"7. The holders of the debentures of the above series (including the bearer hereof) are and will be entitled *pari passu* to the benefit of, and subject to the provisions contained in, an indenture dated the 1st day of August, 1882, and made between the company of the first part and *Thomas Eyre Foakes, Hermann Ludwig Carl Schultz,* and *Theodore H. Lowe* of the second part, whereby all property of the company (both present and future) was made a security for the payment of the principal moneys and interest payable under such debentures."

By the trust deed there referred to, the company granted and assigned to the trustees, "All and singular the property specified or referred to in the 2nd schedule hereto, and all lands, buildings, mines, minerals, railways, tramways, plant, machinery, stock-in-trade, easements, franchises, privileges, moneys, choses in action, and property whatsoever and wheresoever to which the company is now, or shall at any time hereafter become, entitled, To have and to hold the said premises unto and to the use of the present trustees, their heirs, executors, administrators, and assigns," upon the trusts therein declared for the benefit of the holders of the debentures.

This deed contained (*inter alia*) the following provisions:—

"11. The company doth hereby covenant with the present trustees, their executors, administrators, and assigns, as follows: First, that the company will pay the principal moneys and interest secured by the debentures in accordance with the tenour thereof respectively, and will observe and perform the several conditions indorsed thereon respectively; secondly, that the principal moneys and interest intended to be secured by the debentures shall be a first charge on the mortgaged premises, and that the said principal moneys and interest shall take precedence over all moneys which may hereafter be raised by the company by any means whatsoever, and that as between the several holders thereof (except as herein otherwise provided) the debentures shall rank *pari passu,* without any preference or priority by reason of date of issue or otherwise."

"14. The trustees or trustee may, from time to time and at any time, waive, on such terms and conditions as to them or him shall seem expedient, any breach by the company of any of the covenants in these presents contained."

The petition alleged that the company was wholly unable to pay its debts; that it had no property in *England* except a small balance at its bankers, and that its only other property was the land which it had acquired in *Colorado*. It also alleged that the company had issued or deposited debentures to secure debts due by the company to an amount of about £23,000, and that there was an arrear of interest due upon the debentures, to the amount of about £2500, which the company had no means of paying, and that the assets of the company, including all moneys (if any) recoverable for unpaid capital, would be quite insufficient to meet the company's liabilities, and that the company was unable to pay the debt owing to the Petitioner, or any other debts of the company, and continue business with any prospect of paying the company's liabilities in full."

There was no allegation that the Petitioner had presented his overdue coupons for payment, but there was evidence that he had presented them to the company's bankers, and had been refused payment. There was some evidence that the company had no property in *England* except a balance of about £10 at their bankers, and that some debentures had been issued to the directors in payment of their fees. The Petitioner admitted that he held the debentures only as security for an advance of £100 which he had made to the original holder, a Mr. *Barker*. Two of the trustees of the debenture deed were directors of the company, and the third was in *Colorado*.

Cozens-Hardy, Q.C., and *H. Burton Buckley*, for the Petitioner:—

The form of the debentures is such as to make the Petitioner a creditor of the company and entitled to a winding-up order under the circumstances: *Ex parte Colborne and Strawbridge* (1).

Higgins, Q,C., and *Seward Brice*, for the Company:—

It is clear that the company has no assets beyond the property which is comprised in the debenture deed; the petition is therefore demurrable: *In re Chapel House Colliery Company* (2). The debenture-holders have priority over costs of winding-up as regards the property comprised in the deed: *In re Regent's Canal*

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(1) Law Rep. 11 Eq. 478.

(2) 24 Ch. D. 259.

Ironworks Company (1). The Petitioner is not a creditor of the company who is entitled to petition; his only remedy is through the trustees of the deed: *In re Uruguay Central Hygueritas Railway Company of Monte Video* (2).

Warmington, Q.C., and *Grosvenor Woods*, for other debenture-holders, supported the petition.

Cozens-Hardy, in reply:—

It is possible that in a winding-up moneys may be recoverable from the directors by way of damages for misfeasance; such sums would be distributable among the creditors of the company, though they would not be assets comprised in the debenture deed. Two of the trustees of the deed are directors of the company, and the third is in *Colorado*. Moreover, the directors insist on going on issuing debentures in order that their fees, amounting to £1000 per annum, may be paid. This wilful appropriation of the property of the debenture-holders can only be stopped by a winding-up order. In *In re Uruguay Central Hygueritas Railway Company of Monte Video* the petitioner was the only debenture-holder who desired a winding-up; in the present case all the debenture-holders desire it.

PEARSON, J.:—

On the whole, though not without some doubt, I think I ought not to dismiss the petition. The case is just upon the line. The Petitioner has paid £100 to *Barker* for the debentures which he holds, and he admits that he holds them, as between himself and *Barker*, only as security for that £100. The debentures being payable to bearer, the Petitioner, as it appears to me, is not prevented from enforcing payment of them, though, as between himself and *Barker*, they belong to *Barker*. Nor is there, to my mind, any fraud in the transaction. An objection has been taken by reason of the form of the debentures. They are secured by a trust deed in the ordinary form, except that it contains one provision which, I hope, is unusual, enabling the trustees, on such terms as shall seem expedient to them, to waive any breach by the company of the covenants contained in the deed. It is said that the Petitioner is entitled to recover the amount of his debentures only through the trustees of the deed, and that, therefore, he is not a creditor of the company and cannot be entitled to a winding-up order, and for this purpose *In re Uruguay Central Hygueritas Railway Company of Monte Video* (1) has been cited. But when that case is looked at it appears that the covenant in the debentures to pay the money secured thereby was not entered into by the company with the bearer at all, but it was a covenant by the company with the trustees of the covering deed that the company would pay the bearer of the debenture, and Sir *G. Jessel*, M.R., laid stress on this provision as shewing that there was no direct debt from the company to the holder of a debenture, and that it was manifestly intended that the money should be recovered in the manner expressed in the trust deed, and in no other. In the present case the form of the debenture is entirely different. There is no covenant in it with the trustees of the deed, but there is an agreement by the company with the bearer of the debenture that they will pay him.

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(1) 3 Ch. D. 411.

(2) 11 Ch. D. 372.

The next proposition is that the company has no assets. I am not satisfied that this is so; I am not satisfied that all the company's assets are included in the trust deed. I am not satisfied that there are not some moneys *dehors* the deed which may be applicable to the payment of the company's general creditors. I have no intention of going counter to the decision in *In re Chapel House Colliery Company* (2). I propose to direct an inquiry in Chambers whether there are any and what assets, other than those comprised in the debenture deed, available for the general creditors of the company. Then I will refer it to Chambers to appoint a provisional liquidator, with all the powers of an official liquidator, but he is to take no steps without the direction of the Judge in Chambers, beyond taking possession of the property of the company within the jurisdiction of the Court, including their books and papers. The further hearing of the petition will stand over until after the inquiry has been answered.

Solicitors: *Miller & Miller; Snell, Son, & Greenip; Beall & Co.; H. C. Barker.*

W. L. C.

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(1) 11 Ch. D. 372.

(2) 24 Ch. D. 259.

PEARSON, J.
1884
May 17, 19.

In re HERNANDO.
HERNANDO *v.* SAWTELL.

[1882 H. 4630.]

Domicil—Marriage of Englishwoman with Foreigner—Settlement in English Form—Separate Use—Power of testamentary Disposition—Power of Appointment by "writing at any time hereafter"—Exercise by Will previously executed—Wills Act (1 *Vict. c.* 26), *ss.* 24, 27 [*Revised Ed. Statutes, vol. viii. pp.* 34, 35.]

On the 20th of December, 1881, prior to the marriage (solemnized in *England*) of a domiciled Englishwoman (a widow) with a domiciled Spaniard, real estate in *England* of the intended wife was vested by her in a trustee in fee, to such uses as the intended wife should by deed or will appoint, and, subject thereto, to the use of the intended wife, for her separate use. The settlement was made with the approbation of the intended husband, and the deed contained a statement that this approbation was given in consideration of a renunciation the same day executed by the intended wife of any rights which she would otherwise have acquired by her marriage in respect of the property of the intended husband according to the law of *Spain.* The deed also contained a declaration that it was to take effect and be construed according to the law of *England.* The marriage was solemnized on the next day. On the 23rd of February, 1882, the wife (being then domiciled in *Spain*) executed a deed-poll, in accordance with the provisions of the settlement, whereby she, in exercise of the power given to her by the settlement, appointed the real estate to the use of herself in fee for her separate use. By another deed executed the same day, to which the husband was a party, she, with the consent of the husband, appointed and conveyed, and the husband conveyed, the real estate to the use of a trustee in fee, upon trust for sale, and out of the proceeds of sale to pay certain specified debts, and, subject thereto, in trust for such person or persons as the wife "shall at any time or times hereafter by any writing or writings from time to time appoint," and, in default of any appointment and subject thereto, in trust for the wife absolutely for her separate use. Under this deed the trustee sold the property and out of the proceeds of sale paid the specified debts, and there then remained a surplus in his hands. The wife died in June, 1882, having by a will, executed immediately after her marriage, and which purported to be made in exercise of the powers reserved to her by her marriage settlement, and of all other powers enabling her, directed, appointed, and declared that the real and personal estate over which she had any disposing power at the time of her death should be held and applied in the payment of certain legacies and annuities, and, subject thereto, she gave four-fifths of her real and personal estate, in case she should leave no children, to her husband absolutely. And she gave the remaining one-fifth of her property, charged with the before-mentioned annuities and legacies, to her brother and sisters, or to the children *per stirpes* of such of them as should die before her leaving children. The testatrix died without issue. The husband survived her. According to the law of *Spain* under such circumstances two-thirds of her property belonged to her father and mother, notwithstanding that she had left a will:—

Held, that, whether the will was or was not a good exercise of the power reserved by the deed of February, 1882, it was a valid testamentary disposition by virtue of the limitation in default of appointment to the separate use of the testatrix; that it took effect according to English law, and that the legatees named in it (including the husband) were entitled to the benefits given to them by it.

Semble, that, on the authority of *Boyes* v. *Cook* (1) the will was a valid exercise of the power of appointment given by the deed of February, 1882.

ON the 21st of December, 1881, *Edith Slater*, a widow, who was a domiciled Englishwoman, was married in *London* to *Faustino Hernando y Horcajo*, a domiciled Spaniard.

On the 20th of December, 1881, a deed of settlement (called the *Walworth* settlement) was executed in contemplation of the intended marriage. This deed contained a recital that Mrs. *Slater* was entitled to one-third of one quarter share in certain profits (thereinafter called the coal profits) arising from certain coal mines within the manor of *Accrington* during the continuance of a license then held by *John Hargreaves* and *H. H. Bolton*, which would expire on the 25th of March, 1888, and also to certain leasehold houses at *Walworth*, specified in a schedule to the deed, under certain leases and subject to the rents and mortgages mentioned in the schedule, and that in contemplation of the intended marriage the intended husband and wife had agreed that such settlement as thereinafter appearing should be made of the coal profits and the leasehold houses. And it was witnessed that, in consideration of the intended marriage and in pursuance of the agreement, Mrs. *Slater*, with the approbation of Don *Hernando* testified by his executing the deed, "and given in consideration of the renunciation this day executed by the said *Edith Slater* of any right which she would otherwise have acquired by her marriage in respect of the property of her intended husband according to the laws of *Spain*," did thereby assign unto *T. H. Tuke* and *G. H. Sawtell*, their executors, administrators, and assigns, the coal profits and the leasehold houses, to hold the coal profits unto

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(1) 14 Ch. D. 53.

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the trustees absolutely, and to hold the leasehold houses unto the trustees for the residues of the leases thereof, but subject to the rents and covenants and mortgages affecting the same, nevertheless, as to all the thereby assigned premises, in trust for Mrs. *Slater* until the intended marriage, and, after the solemnization thereof, as to the coal profits, in trust to apply the same from time to time under such arrangements as they should think most beneficial in or towards satisfaction of the mortgages for the time being affecting the leasehold houses, with power to accumulate the coal profits as therein mentioned; and, as to the leasehold houses, in trust out of the income thereof to pay the rates and other outgoings in respect of the same premises, and also the interest on the mortgages affecting the houses; and, subject as aforesaid, the trustees should hold as well so much (if any) of the coal profits as should not be required for satisfaction of the mortgages, as also the leasehold houses and the income thereof, upon and for such trusts and purposes, subject to such powers, and generally in such manner as Mrs. *Slater* should, notwithstanding her intended coverture and whether covert or sole, at any time after the expiration of six years from the 25th of March then next, or such earlier period as the mortgages affecting all the leasehold houses should have been fully discharged, by deed or writing, signed, sealed, and delivered by her in the presence of three attesting witnesses, one of whom should be a solicitor practising in *England*, or the British Consul, or a member of the consular body of the place in which such deed should be executed, with or without power of revocation, or by will or codicil from time to time or at any time appoint; and, subject as aforesaid, in trust for Mrs. *Slater* for her sole and separate use, but so that she should not have power to dispose of the same or the income thereof, or of any part thereof, by anticipation, otherwise than by deed or writing executed by her and attested in manner aforesaid. And it was thereby declared that the deed should take effect and be construed according to the law of *England*.

By another deed (called the *Hampstead* settlement), dated the same day, and containing similar recitals and a similar statement as to the renunciation executed by Mrs. *Slater*, she, with the approbation of her intended husband, granted to *G. H. Sawtell*, his heirs and assigns, certain real estate situate at *Hampstead* and specified in a schedule to the deed, to hold to *Sawtell*, his heirs and assigns, to such uses, upon and for such trusts and purposes, subject to such powers, and generally in such manner as Mrs. *Slater* should, notwithstanding her intended coverture and whether covert or sole, by deed or writing, signed, sealed, and delivered by her in the presence of three attesting witnesses, one of whom should be a solicitor practising in *England*, or the British Consul, or a member of the British Consulate of the place in which such deed should be so signed, sealed, and delivered, and acknowledged as required by the statute law of *England* affecting the estates of married women, without power of revocation and new appointment, or by will or codicil, from time to time or at any time appoint; and, subject as aforesaid, to the use of Mrs. *Slater*, her heirs and assigns, for her sole and separate use, but so that she should not have power to dispose of the same premises, or of the rents and profits thereof, or any part thereof respectively by anticipation, otherwise than by deed or writing signed, sealed, and delivered by her, and attested and acknowledged in manner aforesaid. And it was thereby declared that the deed should take effect and be construed according to the law of *England*.

By a deed-poll dated the 23rd of February, 1882, and executed and attested in accordance with the provisions of the *Hampstead* settlement, and duly acknowledged, Madame *Hernando*, in exercise of the power given to her by that deed, thereby appointed that the *Hampstead* property should immediately after the execution of the deed-poll, go, remain, and be to the use of herself, her heirs and assigns, for her sole and separate use and benefit, freed and discharged from the debts, control, and engagements of her husband, and so that she should have full power to dispose of the same by deed, will, or otherwise, as she might think fit, and so that she might manage and direct the management thereof as if she were a *feme sole.*

By an indenture dated the same day, and made between Madame *Hernando* of the first part, Don *Hernando* of the second part, aud *L. M. Wynne* of the third part, after a recital of the deed-poll of the same date, and a recital that Madame *Hernando*

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was desirous of conveying the *Hampstead* property unto and to the use of *Wynne* upon such trusts as were thereinafter declared, it was witnessed that, in pursuance of such desire and in consideration of the premises, she, as beneficial owner and with the consent of her husband, did thereby appoint and convey, and the husband did thereby convey, unto *Wynne*, his heirs and assigns, the *Hampstead* property (described in the schedule); to hold the same unto and to the use of *Wynne*, his heirs and assigns, in fee simple, upon trust to sell the same, in manner therein mentioned, and to stand possessed of the residue of the purchase-moneys (after payment of costs and expenses) and also of the rents and profits until sale (after payment of outgoings), upon trust to pay the several debts specified in another schedule to the deed (being the mortgage debts then charged on the leasehold houses comprised in the *Walworth* settlement), and, subject thereto, in trust for such person or persons as Madame *Hernando* "shall at any time or times hereafter, whether under coverture or not, by any writing or writings from time to time appoint," and, in default of and until any such appointment and in the meantime subject thereto, in trust for her, her executors, administrators, or assigns, for her sole and separate use and benefit, free from the debts, control, and engagements of her husband. Provided that, notwithstanding anything thereinbefore contained, it should be lawful for her at any time thereafter by deed or will to revoke the trusts thereinbefore declared of and concerning any part of the property which should for the time being remain unsold, and by the same or any other deed or will to declare any other trusts she might think fit of the property the trusts whereof might be so revoked.

In pursuance of this deed *Wynne* sold the *Hampstead* property, and out of the proceeds of sale he paid off the debts mentioned in the schedule to the deed, and there then remained a surplus in his hands. Madame *Hernando* died on the 8th of June, 1882, without issue, leaving her husband and also her father and mother her surviving. She had on the 21st of December, 1881, immediately after her marriage, executed a will in the English form. This will purported to be made in exercise of the powers reserved to her by her marriage settlement, and of all other powers her enabling in that behalf, and she thereby directed, appointed, and declared that the real and personal estate over which she had any disposing power at the time of her death should be held and applied as follows: First, she gave the sum of £50 each to the acting executors of her will, to each of her sisters who should survive her for her separate use, to her brother, and to her servant, *Emma Gay*, and she directed that such legacies should be payable out of the one-fifth of her entire property which she was advised that she could by the law of *Spain* dispose of in any case. And she further directed that out of the said one-fifth of her property an annuity of £100 should be payable to each of her parents, or such one of them as should survive her, for the term of his or her life respectively, and, subject as aforesaid, she directed that the said one-fifth of her estate should be the absolute property of her husband in case there were children of her marriage. And she gave the remaining four-fifths of her real and personal estate to her children in equal shares. Should she leave no children she gave four-fifths of her real and personal estate to her husband absolutely. And she gave the remaining one-fifth of her property, charged with the before-mentioned annuities and with the legacies thereinbefore given to her acting executors and to the said *Emma Gay*, to her brother and sisters, or to the children *per stirpes* of such of them as should die before her leaving children. And she appointed *T. H. Tuke* and *G. H. Sawtell* to be executors and original trustees of her will. After her death the will was proved in the Probate Division by *Sawtell* alone.

This action was brought by Don *Hernando* against *Sawtell*, *Tuke*, and *Wynne*, for the execution of the trusts of the will, and by the judgment at the trial on the 15th of December, 1882, it was declared that the trusts of the will, and of the *Walworth* settlement, and of the indenture of the 23rd of February, 1882, ought to be performed and carried into execution, and various accounts and inquiries were ordered to be taken and made.

The Chief Clerk, by his certificate, dated the 23rd of April, 1884, found (*inter alia*) that, the domicil of the testatrix being Spanish at the time of her death, the law of *Spain* was as stated in the opinion of a Spanish jurist, which was set out in a schedule to the certificate. This opinion stated "that according to Spanish law the testatrix has not died intestate, but under a valid and effectual will, which must be fulfilled in so far as it may not be contrary to law. That in *Spain* there belong to the parents of those who die without descendants, as their shares according to law (*legitima legal*), two-thirds of the property of their children, without distinction of moveable or immoveable property, nor of testacy or intestacy. That the testatrix not having left those two-thirds to her parents, but a smaller sum, it must be made up for them and delivered over to them by proportionally reducing, and so far as may be necessary for the purpose, the legacies of four-fifths and one-fifth made by the testatrix, the only thing in which the will is contrary to law."

A petition was then presented by the Plaintiff praying a declaration that the will of the testatrix was a valid execution of the power reserved to her by the *Walworth* settlement; that all the property comprised in that settlement passed under the will according to the purport and effect thereof, notwithstanding that the domicil of the testatrix was Spanish at the time of her death; and a declaration that the deed-poll of the 23rd of February, 1882, and the indenture of the same date were valid exercises, or that one and which of them was a valid exercise of the power of appointment reserved to the testatrix by the *Hampstead* settlement over all the property therein comprised, and that the will was a valid exercise of the power of appointment reserved to the testatrix by the indenture of the 23rd of February, 1882, of the proceeds of sale of the *Hampstead* property, after payment of the mortgage debts on the *Walworth* property, and, notwithstanding that the domicil of the testatrix was Spanish at the time of her death, that the same was by the will validly appointed and given to the persons entitled under the will, in the shares and proportions therein mentioned.

Cozens-Hardy, Q.C., *Underdown*, and *Methold*, for the Petitioner:—

When the original settlements were executed the domicil of the wife was English. There was an express contract between the parties that the settlement should take effect according to English law. They had power to enter into such a contract: *Este* v. *Smyth* (1). The devolution of that part of the property which is immoveable, *i.e.*, the leasehold houses, must of course be governed by English law.

The will is a good exercise of the power of appointment reserved by the "*Walworth*" settlement, both as regards the leasehold houses and the "coal profits." And, as to the proceeds of sale of the *Hampstead* property, the will is a good exercise of the power of appointment reserved by the indenture of the 23rd of February, 1882, although the will was executed before that date: *Boyes* v. *Cook* (2). But, if the will is not a good exercise of the power, it validly disposes of the property as separate property of the wife. As such property she had power to dispose of it according to English law as if she had been a *feme sole*, and, though at the date of the will and of her death her domicil was Spanish, the operation of Spanish law is entirely excluded by the original settlement.

Giffard, Q.C., and *Stirling*, for the wife's father and mother:—

We admit that English law governs the disposition of the immoveable property.

The will is not a valid exercise of the power of appointment reserved by the "*Walworth*" settlement; the power could not be exercised till after the expiration of the six years mentioned in the deed, and moreover the wife was restrained from anticipation otherwise than by a deed executed in the specified manner. The will was executed during the coverture and was not a permitted mode of anticipation.

As to the proceeds of sale of the *Hampstead* property, the deed-poll of the 23rd of February, 1882, exhausted the power of appointment reserved by the "*Hampstead*" settlement, and the indenture of even date converted the land out and out into money. The will was not a valid exercise of the power of appointment reserved by the indenture, for that power was to be exercised "*hereinafter*," by writing, *i.e.*, after the execution of the indenture. The power could not be exercised by a will previously

(1) 18 Beav. 112.

(2) 14 Ch. D. 53.

executed: *Taylor* v. *Meads* (1). In *Boyes* v. *Cook* (2) a will was expressly mentioned in the power.

If the power is not exercised by the will, the testatrix could not under the limitation to her separate use dispose of the property in a manner inconsistent with the Spanish law; she could only validly dispose of that part of her property of which according to Spanish law she was entitled to dispose. Her domicil was that of her husband, which was Spanish. The effect of the limitation to her separate use was merely to exclude the marital right, and place her in the position of a *feme sole,* but then she could only exercise her right of disposition in accordance with the law of her domicil. The law of the domicil always determines the succession to personal property whether the deceased person has died testate or intestate. The right of disposition given by the limitation to the separate use must be subject to the rights of those who under the law of the domicil are entitled to share in the property of the deceased person: *Enohin* v. *Wylie* (3); *Preston* v. *Viscount Melville* (4); *Studd* v. *Cook* (5).

Dibdin, for the trustees of the settlements.

D'Arcy Todd, for the trustee of the deed of February, 1882.

Cozens-Hardy, in reply.

PEARSON, J. (after stating the facts relating to the "*Walworth*" settlement), continued:—

I will assume that the "coal profits" were personalty, and simply personalty. From the recitals in the deeds it appears that, in view of the marriage, the lady had agreed to execute, and had in fact executed, a renunciation of all the rights which she would otherwise have acquired by her marriage in respect of the property of her intended husband according to the laws of *Spain;* and, having done this, she proceeds to settle her own property expressly according to the law of *England,* because there can be no doubt whatever that the settlement was intended to be an

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(1) 4 D. J. & S. 597.

(2) 14 Ch. D. 53.

(3) 10 H. L. C. 1.

(4) 8 Cl. & F. 1.

(5) 8 App. Cas. 577.

English settlement; indeed it is expressly declared in each of the deeds that it is to take effect and be construed according to the law of *England*. That seems to me to shew conclusively what the parties were doing. The husband was to retain all his property in *Spain*, freed and discharged from any rights which his wife might have acquired and which she thereby renounced, and the wife intended to retain her rights with regard to her property in *England*, which she settled so as to place it at her own disposal by a deed, necessarily executed according to the law of *England* so far as it related to real property, and intended, as was expressly declared, to be construed according to the law of *England*.

The first question which I have to determine with regard to the property comprised in the "*Walworth*" settlement is this: Does the will dispose of it? First, it is said that under the power a will could only be made at the expiration of six years after the 25th of March then next, or at such earlier period as the mortgages affecting all the leasehold houses should have been fully discharged, and that this will, having been made on the day after the marriage, was not a valid exercise of the power. I demur altogether to that construction of the clause. To my mind it would be absurd to say that the lady was to be restrained from making a will until six years after her marriage, because it is plain that the mortgages might not have been discharged until that period had expired. Unless, therefore, the words are so strong as that I cannot by any possibility put any other construction upon them, I should certainly hesitate to adopt that interpretation. But, to my mind, the words are perfectly intelligible, and can be read grammatically in a way which seems to me reasonable. I have no hesitation in saying that that limitation of time applies only to deeds *inter vivos*, and not to any testamentary instrument. Reading the words simply as they are written, I do not think any layman would imagine that the six years' limitation applied to a will, and, inasmuch as the words can be read perfectly grammatically without implying any restraint during the six years upon the power of making a will, I so read them, and I think that is the way in which they ought to be read. I do not mean to rely upon it as binding me in the construction of the deed, but it must not be forgotten that the construction put upon the clause by the parties themselves is that which I have put upon it; because immediately after the marriage the lady made her will, certainly not then imagining that she had no power to make a will for six years.

Then it is said the next clause in the deed controls the testamentary power altogether. The property is given upon trust for the wife for her separate use, but so that she should not have power to dispose of the same or the income thereof, or of any part thereof, by anticipation, otherwise than by deed or writing executed by her and attested in manner aforesaid. I am of opinion that that applies only to alienation *inter vivos*, and that she is restrained from anticipation, which could only be during her lifetime, except by deed or writing in manner thereinbefore mentioned. That, to my mind, can have no application to a testamentary disposition, because such a disposition would have no effect whatever until after her death. I come, therefore, to the conclusion that the will was a proper and complete exercise of the power contained in the " *Walworth* " settlement, and therefore the " coal profits " and the *Walworth* property must go according to the dispositions of the will.

The *Hampstead* property stands in a different position. [His Lordship stated the effect of the deeds relating to the " *Hampstead* " property, and continued:—] These deeds are not disputed. It is admitted that they must have their proper effect given to them, whatever that effect is. The property has been sold; it has all been converted into money. Mr. *Wynne* holds the money on the trusts of the deed of February, 1882, and the question is, what is to become of the money? It is said that, inasmuch as the money was to be held in trust for the wife's separate use, that means her separate use as the wife of a Spanish gentleman, the separate use of a lady who was by virtue of her marriage domiciled in *Spain*, and that it can only be disposed of subject to the law of *Spain* as to the right of a married woman to dispose of her property. And, if the law of *Spain* is to prevail, then it is found by the Chief Clerk that according to that law she had only the right to dispose of one-third of her property, and the other two-thirds go to her father and mother. On the other hand, it is said first that the will which she made on the 21st of December, 1881, disposes of this property under the power contained in the deed, and secondly, that, if it does not, inasmuch as the money was given to her for her separate use, that limitation must be construed according to the law of *England*, according to which law, by virtue of a settlement to her separate use, she would have a right to make a will, and then the property would pass under the will of the 21st of December, 1881. It was argued also on behalf of her father and mother that the effect of the appointment to Mr. *Wynne* was to take the property out of the original settlement, and to make a new settlement of it, and that, although the original settlement was to be construed by the law of *England*, it does not follow that the later settlement is so to be construed. And it is said that, when she took for her separate use under the later deed, she was a Spanish woman, and that the law of her domicil must, now that she is dead, decide the disposition of her property, and that the will must therefore be construed according to the law of *Spain*.

Now when I look at these settlements, and more especially when I consider the recital in the marriage settlement that the wife had renounced all her rights to her husband's property, that that was a part of the consideration for the making of the settlement, and that the original settlement was an English settlement, the conclusion at which I arrive is this, that the subsequent dealings with the property were meant to bear the same character as the original settlement, and that the lady was intended to have the power of dealing with all the property as an Englishwoman, as if she had remained an Englishwoman with all the rights which an Englishwoman would have, and to treat these subsequent settlements as anything but the settlements of an Englishwoman dealing with English property, would, to my mind, be to derogate entirely from the agreement which was made on the marriage between the husband and the wife, and which, as it seems to me, was that the wife's property should remain her property as an Englishwoman, and that the husband's property should remain his property as a Spanish gentleman; that the husband was to be excluded from the wife's property as she was to be excluded from his

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property. Upon this ground alone I should hold that I must construe these deeds as deeds dealing entirely with the property of an Englishwoman.

But I have still to consider what is the meaning of the deeds of February, 1882. They must have been made according to the law of *England*. There could have been no dealing with the *Hampstead* property except by deeds duly executed and valid according to the law of this country, and accordingly two deeds were executed properly and strictly according to the law of this country. They are English deeds, and the subject-matter of them is English. It is perfectly true that the lady herself had then acquired a Spanish domicil. As regarded the real property, until it was converted into money it would be the real property of a lady originally an Englishwoman, which was originally settled according to English law, real property which was necessarily dealt with all through according to English forms. And I think I should be wrong if I did not give these deeds the proper construction which they ought to have according to English law. When I come, therefore, to the clause which gives the money in trust for the lady for her separate use, I think I cannot do otherwise than construe it according to English law, and the meaning of giving the property in trust for her separate use is, as we all know, to make her as regards that property a *feme sole*, and to give her the power of dealing with it so as to exclude her husband after her death, as by the terms of the instrument he is excluded during her life. I hold, therefore, that, at all events under the gift to her separate use, she had the power of dealing with this property as she pleased. It is perfectly immaterial that there was a prior power of appointment. Whether that power was ignored or imperfectly exercised is of no consequence at all. If it was imperfectly exercised or forgotten, and she chose to act under the power which the limitation to her separate use gave her, she had a perfect right to do so, and under these circumstances I need not inquire whether as an exercise of the power of appointment the will would pass the property, because, if it did not pass under the power of appointment, it passed under the power which the limitation to her separate use gave her. I confess, however, that after the decision in *Boyes* v. *Cook* (1) it seems to me very difficult to say that the power of appointment was not well exercised by the will. The limitation was in trust for such persons as she should at any time thereafter by any writing appoint, and it is said that the power could not by any possibility be exercised by a will made before the power was created. In *Boyes* v. *Cook* the power was created after the will was made, and yet a devise by a former will was held to be an exercise of the power. I do not see therefore why the will in the present case should not be an exercise of the power. But I do not intend to decide the case upon that ground, because, even if the will was inoperative under the power, at all events under the limitation to her separate use the testatrix had the right to dispose of this property and she has disposed of it, because the will is undoubtedly an exercise of the testamentary power which she had as a *feme sole* under the absolute limitation to her separate use.

I hold, therefore, that the will is a valid disposition of the property comprised in the two marriage settlements, and that the property passes to those persons to whom it is given by the will.

Solicitors: *Wynne & Son; Clarke, Woodcock, & Ryland; Bridges, Sawtell & Co.; Arthur Tyler.*

W. L. C.

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(1) 14 Ch. D. 53.

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May 23.

GALLARD v. HAWKINS.

[1883 G. 2364.]

Copyholds—Trustees—Customary Heiress of Devisee of Surviving Trustee—Right of Escheat—Mandamus.

A testatrix who died in 1851 devised her copyhold property to a trustee in trust to pay the rents and profits to *J. King* for life, and after her death to certain charitable purposes which were void under the *Mortmain Acts.* The testatrix died without heirs. The trustee named in the will refused the trust, and two trustees were appointed by order of the Court in 1853, who were admitted upon the court rolls to hold upon the trusts of the will. One trustee died in 1873, and the surviving trustee, who died in 1877, devised his trust estates to two trustees, neither of whom was admitted to the copyholds. The survivor of these trustees made no devise of his trust estates, and died leaving his youngest daughter, *Janet Hawkins,* his customary heiress according to the custom of this manor. The tenant for life under the will died in 1883:—

Held, that *Janet Hawkins,* who claimed by escheat and under a resulting trust, was entitled to be admitted as tenant to the copyhold property for her own benefit as against the lord of the manor.

THIS was a special case.

Catherine Parkes, late of *Brighton,* was on the 30th of April, 1833, admitted tenant to certain copyhold property known as "*Dial House,*" and holden of the manor of "*Hova Villa et Hova Ecclesia,*" to hold the same to her and her heirs and assigns for ever by copy of court roll. The said *Catherine Parkes* by her will, dated the 5th of May, 1851, gave and devised to *Thomas Hatchard* all her copyhold messuage or tenement, garden, and premises situate in *Hove,* to hold the same unto the said *Thomas Hatchard,* his heirs and assigns for ever, according to the custom of the said manor, but upon trust out of the rents and profits thereof to keep the premises in repair, and to pay other incidental expenses, and to pay the residue of the rents and profits to *Jane King* for her life, and after her death then upon trust to pay the rents and profits to *Catherine Callander* for life or until her marriage, and after her marriage or decease the testatrix gave the rents and profits of the said messuage or tenement to certain charitable purposes, which were admitted to be void under the *Statute of Mortmain.*

The testatrix died in July, 1851, being then seised of the said copyhold premises for a customary fee simple estate therein for her own benefit absolutely.

By an order of the Court of Chancery, dated the 27th of June, 1853, made on the petition of *Jane King*, to which the lords of the manor were parties Respondents, *Edmund King* and *Henry King* were appointed trustees of the will in substitution of *Thomas Hatchard*, who had refused to accept the trusts thereof, and in pursuance of the said order, on the 3rd of March, 1863, the copyhold premises were surrendered to the lords of the manor to the use of *Edmund King* and *Henry King*, their heirs and assigns, upon the trusts declared by the will, and on the 5th of March, 1863, the said *Edmund King* and *Henry King* were admitted tenants of the manor according to the custom and effect of the surrender. *Edmund King* died in February, 1873, and *Henry King* died on the 30th of April, 1877, leaving his son *Charles King* his customary heir him surviving. *Henry King* by his will appointed his brother *Charles King* and *William Hawkins* his executors and trustees, and he devised all estates of which he was possessed as trustee or mortgagee unto and to the use of his said trustees, their heirs, executors, and administrators respectively, and to be disposed of so far as he was beneficially interested as part of his personal estate for the purposes of his will.

Neither of the trustees, *Charles King* or *William Hawkins*, was admitted tenant to the copyhold premises, nor was *Charles King*, the son and customary heir, ever admitted.

Charles King the brother died in January, 1880, and *William Hawkins* died in March, 1880.

William Hawkins made a will, but it contained no devise of trust estates. He left *Ann Hawkins* his widow surviving him, and she was a Defendant in this action in respect of any claim she might have for dower or freebench out of the premises. He also left six daughters and no other children. The Defendant *Janet Eliza Hawkins* was the youngest of such children, and as such she would be the customary heiress of *William Hawkins* as regards any copyhold estates of his, held by him of the said manor at the time of his death. *Catherine Callander*, the second tenant for life under the will, died in the lifetime of the testatrix, and *Jane King*, who in April, 1853, married *Henry Barnard*, survived her husband, and died on the 22nd of March, 1883. *Catherine Parkes*, the testatrix, left no heirs whatever who were entitled to succeed to the said copyhold property.

The Plaintiffs, *George Gallard* and *William Williams*, were the lords of the manor; the Defendant, *Janet Eliza Hawkins*, as such customary heiress, claimed now to be admitted to the copyhold tenements for her own benefit; the Plaintiffs as such lords of the manor refused to grant such admittance.

The question for the opinion of the Court was, whether under the circumstances *Janet Hawkins* as such customary heiress was entitled to be admitted for her own benefit as against the Plaintiffs, the lords of the manor, to the said copyhold premises.

Cookson, Q.C., and *A. Brown*, for the Plaintiffs:—

We claim as lords of the manor of *Hova* to be entitled by escheat to the property which belonged to the testatrix, *Catherine Parkes*, who died without heirs, and without having made any valid disposition of her copyhold estate. The principles upon which the question turns are laid down very clearly in *Watkins* on Copyholds (1). It is there stated: "In case the lord consents to a condition or trust on the court rolls, then he will be bound by it if the tenement falls in; for he cannot claim against persons whose title he has in effect admitted (1 Eden, 177). On the other hand if the *cestui que trust* of copyholds die without heirs, it is not clearly settled whether the estate shall escheat to the lord, or enure to the benefit of the trustee discharged of the trust. The Judges differed in opinion very materially on this point in *Burgess* v. *Wheate* (2), and the decision itself seems disapproved by subsequent writers (see 1 *Belt's* Sup. 368). Thus much, however, has been determined against the trustee, that if *A.* devise copyhold land (duly surrendered) to *B.* and his heirs, in trust for *C.* and his heirs; upon the death of *C.* without heirs, the heir of the trustee has no equity to compel the lord to admit him." And in support of this proposition the case of *Williams* v.

(1) Vol. i. p. 277, n.

(2) 1 Eden. 177.

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Lord Lonsdale (1) is cited. Then at page 342 of *Watkins* there is this note: "It may be worthy of observation, that admittance alone will not operate to confer any estate or a title, if the surrender and custom do not combine." Where a person has a *primâ facie* legal title which is disputed, then the Court of Law will grant a mandamus to the lord and steward of a manor to admit him, in order to enable the right to be tried, though equity has refused to compel the lord to admit him for want of his shewing an equitable title to the property: *Rex* v. *Coggan* (2). If more than one person should claim then they will all be admitted, so that they may try the rights as between themselves, but if only one comes he is admitted, and he so far has a right as against the lord till the others come and claim against him, and where the lord of a manor admits a tenant on the trusts of an indenture referred to in the surrender he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir. The lord cannot refuse to admit any number of adverse claimants, he having no business with their rights as between themselves. This is established by the cases of *Rex* v. *Hexham* (3), *Garland* v. *Mead* (4), *Reg.* v. *Garland* (5), and *Attorney-General* v. *Duke of Leeds* (6).

In this case there is no trustee upon the court rolls, and there is no *cestui que trust* who has a right to claim; the estate therefore escheats to the lord.

[They also cited *Weaver* v. *Maule* (7); *Paterson* v. *Paterson* (8); *Doe* v. *Vernon* (9); *Scriven* on Copyholds (10).]

Elton, and *Raven*, for *Janet Eliza Hawkins*:—

We submit that the Defendant being the customary heir of the devisee of the last surviving trustee is the person who is entitled to be admitted as the copyhold tenant, and that she is entitled to hold for her own benefit. When the trustees were appointed by the Court, and were admitted, the person appointed surrendered upon the trusts of the will, and the rights of the trustees under the will could not be diminished. They were admitted to all the benefits they would have under the will. If when the tenant for life under the will died, there had then been trustees on the rolls of the manor they could not have been disturbed, and the lord would have had no right of escheat. The only power the lord could have had would have been to inquire into the legal rights of the persons on the rolls, he had nothing to do with the trusts upon which they held the property. While the tenant for life was in existence she might have required the admission of other persons as trustees for her. The decision in *Rex* v. *Coggan* (1) shews that a mandamus will lie to compel the lord to admit a person to a copyhold tenement who has a *primâ facie* legal title; and in *Attorney-General* v. *Sands* (2) it was held that the lord could not claim by equitable escheat. The lord could only claim by escheat *propter defectum tenentis,* although a Court of Equity would not interpose as between the lord and the heir of a trustee claiming to be admitted when the *cestui que trust* died without an heir, as in *Williams* v. *Lord Lonsdale* (3), yet a Court of Law would in such a case compel the lord to admit the heir of a trustee to enable him to try his title, and when so admitted the lord could have no equity paramount to such heir.

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(1) 3 Ves. 752.
(2) 6 East, 431.
(3) 5 Ad. & E. 559.
(4) Law Rep. 6 Q. B. 441.
(5) Ibid. 5 Q. B. 269.
(6) 2 My. & K. 343.
(7) 2 Russ. & My. 97.
(8) Law Rep. 2 Eq. 31.
(9) 7 East, 8.
(10) 6th Ed. p. 127.

[They also cited *Coke's* Cop. (4); *Onslow* v. *Wallis* (5).]

Wolstenholme, and *Ralph Griffin,* for the widow of *William Hawkins,* who was made a party in respect of any rights which she might have to dower or freebench.

PEARSON, J.:—

This case is said to be a new case in the year 1884, and I am told that a writer whom we all respect, in the year 1826 said it was then an open question. The writers who have followed since that time perpetuate the remark, and say that it is still an open question. It seems to me that upon the same ground every case which has not been pointedly decided, either in this Court or in some other Court, must be held to be an open question; but it seems to me really the question is not an open question, but has been decided nearly 100 years ago.

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(1) 6 East, 431.
(2) 3 Ch. Rep. 36.
(3) 3 Ves. 752.
(4) Sect. 41.
(5) 1 Mac. & G. 506.

The case is shortly this: A lady named *Parkes* left this copyhold property to a trustee who never accepted the trust, and never was admitted, upon trust for Mrs. *Barnard* for life, and upon the death of Mrs. *Barnard* she devised the property upon trusts which infringed the law of what is commonly called in this Court the law of mortmain, and which being void carried the property to her heirs if she had any; but she died without heirs. The special case is framed entirely upon the supposition that at the death of Mrs. *Parkes* she had no heirs, and that she has no heir now. After the death of Mrs. *Parkes*, and during the lifetime of Mrs. *Barnard*, this Court, in 1853, appointed *Edmund King* and *Henry King* to be trustees, and those trustees were admitted. A copy of the admission is appended to the special case, and *Aldbury*, the person appointed to surrender by the order of the Court, does accordingly surrender "to the use of *Edmund King* and *Henry King*, their heirs and assigns, to the will of the lords and ladies of the manor, by and under the accustomed rents, suits, and services, upon the trusts, and for the intents and purposes declared and contained in the will of *Catherine Parkes*, dated the 5th of May, 1851, or such of the same trusts, intents, and purposes as were capable of taking effect," and thereupon they are admitted, "to have and to hold the same premises unto the said *Edmund King* and *Henry King*, their heirs and assigns for ever, by copy of the court roll, to the will of the lords and ladies of the manor by the customs of the said manor."

That reference to the will of *Catherine Parkes* was put in in consequence of the trustees having been appointed by the order of the Court, and if it was a surrender to the use of those persons as trustees of that will, I am at a loss to understand how it would in any way diminish any rights that might accrue to them as trustees of the will. Whatever right they would get under the will, and as being trustees of the will, whether it is the right that is now claimed on behalf of the representative of one of those trustees or not, it seems to me that they were admitted to the full benefit of all the rights that accrued to them, whether they came to them upon the express trusts of the will, or whether they came to them by virtue of the law upon the failure of those trusts. The question here raised, if this were freehold property, would be beyond all dispute. However, those trustees died, *Henry King* being the survivor of them; and by a codicil to his will he devised all the trust estates to his brother, *Charles King*, and his friend *William Hawkins*.

That codicil was dated in 1877. *Charles King* died in January 1880, *William Hawkins* died in March of the same year, and neither of them were admitted. *William Hawkins* made a will, but there was no devise whatever of trust estate, and he left his daughter *Janet Eliza Hawkins*, who was his customary heiress according to the custom of the manor of which these copyhold premises are held.

At the time when *William Hawkins* died in March, 1880, Mrs. *Barnard* was still alive; she survived until 1883, and it is perfectly plain that between the death of *William Hawkins* in 1880, and the death of Mrs. *Barnard* in 1883, the trust in her favour was subsisting, and that she had a right to have some person admitted to those copyholds, to act as trustee or trustees for her, though it became immaterial during her life whether any person should be admitted or not. The lord of the manor might, if he pleased, during the interval between the death of *Henry King* and the present time, have required some person to come in and be admitted, but he did not do so. The first point that is raised, and which I will dispose of, if I have not already done so, is that if any person has the right to be admitted at the present moment it is the heir of *Henry King*, who was the last of the two trustees appointed by the Court, and the survivor, therefore, of those persons who were admitted. But inasmuch as *Henry King* actually devised his trust estates to somebody else, that is, to his brother and *William Hawkins*, I am at a loss to see what possible right there can be in the heir of *Henry King* to have anything whatever to do with these trust estates, and I have really only to say whether or not *Janet Hawkins*, the customary heiress of *William Hawkins*, is at the present moment entitled to be admitted, because it is perfectly plain that, sitting here, I cannot order a writ of *mandamus* to issue to the lord to admit her. The parties have chosen to come here to have their rights determined on the special case, and they have brought it in this Division which would not issue a *mandamus* to compel the lord to admit. The only thing I can determine is whether or not, according to my conception and understanding of the law, *Janet Hawkins* is at the present moment entitled to be admitted? I cannot go further than that. Having determined that, I must leave the parties to act upon my opinion on the special case, or not, as they please. I have no jurisdiction beyond that of answering the question.

The question is raised in two ways. First of all has *Janet Hawkins* a right or not at law to be admitted; and, secondly, if she were admitted would she have any right to receive the profits of these copyhold hereditaments?

What is said is this; even assuming according to law she might have a legal right to claim admittance, that is a bare legal right which never could be enforced against the lord of the manor, because if she were admitted she would have no right to profits as against the lord, and she would be, as suggested, a trustee for the lord, and if that were so it would be a piece of folly to order the lord to admit her. It is said, therefore, that this Court, or any Court, would never on any consideration order the lord to admit her, coming to the conclusion that if she were admitted she must be a trustee for the lord, and, as I understand the argument, that if she was not a trustee for the lord the lord would have the right to eject her.

Now a question, which I put very early in the case to Mr. *Cookson*, seems to me still, after hearing the argument on both sides, to be practically conclusive in this case; I asked if in a case of this kind, there were trustees upon the court rolls at the time when the trusts came to an end, whether the lord of the manor could disturb them. Certainly I have received no very confident answer to that question; and to my mind the only possible answer would be, that the lord could not disturb them.

The Lord Keeper, who gave his judgment in that case of *Burgess* v. *Wheate* (1), as to the law of which there is no doubt now, says, in the year 1759, "I think from these authorities it is as well founded as any position in law, that the law does not regard the tenant's want of title as giving the lord any claim by escheat," and if that be so, I cannot understand what possible right the lord has to inquire into anything but the legal right of the person who applies to him for admittance, to be admitted. As I understand the law of escheat as laid down here by Lord Keeper *Henley*—and as I understand the law which has always been laid down—the right of escheat depends upon the want of a tenant, and as long as there is a tenant, or a person who of course has a right to be admitted as tenant, the right of escheat does not arise. If I were to say that the right of escheat arose because the trusts upon which the person admitted would have to hold had come to an end, I must then go further still, and say that in all cases it is the business and duty and privilege of the lord of the manor to inquire into the equitable title of the person claiming admittance before admitting him, and if he found the equitable title of the person so claiming to be admitted insufficient, to say, under these circumstances you have no right to be admitted and I have the right to prevent your being admitted. Certainly there never has been any law of this Court laid down to that effect; and to my mind the cases are directly opposed to anything of the sort.

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(1) 1 Eden, 244.

That very question, as I understand the controversy, arose in the case of *Rex* v. *Coggan* (1), which was decided unfavourably to the Plaintiff in this case. The case of *Rex* v. *Coggan* is very properly said to have been a case supplementary to the case of *Williams* v. *Lord Lonsdale* (2). It arose with regard to the same will, it arose, as far as I can collect, with regard to the same premises with which the question had been concerned in the case of *Williams* v. *Lord Lonsdale*. In the case of *Williams* v. *Lord Lonsdale* the tenant who had the legal right to be admitted to the copyholds, came and asked the Court of Equity to order the lord to admit him. The Court said, "We have nothing to do with it, you say you have a legal title; go to the Court of law and get your legal title enforced as you best may, there can be no equity whatever in your case, and we decline to interfere at all in the matter." In the other case the tenant came to the Court of Law and asked for a *mandamus*, and the answer made by counsel for the lord was this, "there is no equity whatever on behalf of this person to be admitted, because he is coming really in his right as a trustee when all the trusts have failed, and asking to be admitted for his own benefit." Upon which Lord *Ellenborough* said, "We have nothing whatever to do with the trusts here, he has got the legal right, and having the legal right he ought to be admitted."

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(1) 6 East, 431.

(2) 3 Ves. 752.

Well, then, it is said that inasmuch as the law in the case of *Attorney-General* v. *Duke of Leeds* (1) was decided before the Act had been passed, and passed no doubt to remedy the grievance inflicted upon the *cestuis que trust* in that case by the narrow legal decision to which the Court felt itself bound to come, and by which the Court decided that where the trustee died without heirs the lord was entitled to escheat, it must rule this case; and that I must therefore follow that case and say that inasmuch as where the trustee died without heirs the lord had the right to the escheat, so on the same parallel reasoning here, where the trustee who has been admitted outlives his trust, and all the *cestuis que trust* vanish, the lord has the same right to an escheat there. It seems to me to be reasoning which I cannot follow, and I draw a contrary conclusion from the case, and say that if, where the trustee died without heirs, the lord had a right at law to escheat because he knew nothing of the trusts, so in the same way here where the *cestuis que trust* vanish and the trustee is still a tenant upon the Court rolls, the trustee has a right to hold as against the lord because the lord cannot interfere with the trusts or inquire about the trusts in any way whatever. To my mind the rule of law is a very plain and simple one. The rule was laid down in 1759 by the Lord Keeper. The law does not regard the tenant's want of equitable title as giving the lord any claim by escheat. The person who comes here to ask to be admitted as the tenant on the court rolls is the customary heir of the devisee of the last surviving trustee. At law I apprehend that person has a perfectly good right to be admitted, and I can certainly see no equity whatever on the lord's side why I should interfere in his favour, as under other circumstances there would have been no equity on which I could interfere on behalf of the *cestui que trust*. I simply follow, therefore, what I conceive to be the rule of law in this case, and I decline to deprive the customary heir of the devisee of the surviving trustee of the benefit which by the chapter of accidents has devolved upon her.

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(1) 2 My. & K. 343.

I must therefore declare in this case that Miss *Janet Hawkins*, as customary heiress of *William Hawkins*, who was the devisee of *Henry King*, is entitled to be admitted to these copyhold premises and to hold them for her own benefit. That, as I understand, will give Mr. *Wolstenholme's* client, the widow of *William Hawkins*, the right to freebench.

Cookson Q.C. :—

The better way will be for me to move for judgment on that point, the cause being set down for the purpose. The costs are arranged.

PEARSON, J. :—

Very well. Let that be so.

Solicitors: *Lawrance, Plews, & Baker; F. Hickson*, for *C. J. Daintrey, Petworth.*

T. W. G.

In re TUGWELL.

PEARSON, J.
1884
May 28;
June 11.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 7 [*Revised Ed. Statutes, vol. ix., p.* 631]—*Purchase of Land of Lunatic not so found—Conversion—Real and Personal Representatives.*

Sect. 7 of the *Lands Clauses Consolidation Act*, 1845, does not authorize a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorizes the committee of a lunatic to sell.

A public body having given notice under their statutory powers to take land belonging to a lady of unsound mind not so found, the value of the land was ascertained by two surveyors, one appointed by an uncle of the lady, who purported to act on her behalf, and the other by the public body; the sum thus ascertained was paid into Court, and the public body took possession of the land. The lady afterwards died intestate, being still of unsound mind, and her heir-at-law petitioned for payment of the money to him:—

Held, that the land had never been converted into personalty, and that the heir was entitled to the money.

Ex parte Flamank (1) dissented from.

PETITION.

In the year 1851 *Phœbe Tugwell*, spinster, then a person of unsound mind, but not so found by inquisition, was seised in fee simple of some land in *Clerkenwell*. By the *Clerkenwell Improvement Act*, 1851 (14 & 15 Vict. c. cxx.), the corporation of the city of *London* were empowered to make certain improvements in *Clerkenwell*, and for that purpose to purchase (*inter alia*) the land belonging to Miss *Tugwell*. The Act provided (sect. 3) that all the powers and provisions contained in the *London City Improvement Act*, 1847 (10 & 11 Vict. c. cclxxx.), and in the portions of the *Lands Clauses Consolidation Act*, 1845, incorporated therewith, should extend to the Act of 1851. The *Lands Clauses Act* (except so far as it related to the purchase of lands otherwise than by agreement) was (sects. 1, 21) incorporated with the Act of 1847, and that Act provided (sect. 21) that on the purchase of land belonging to persons under disability the value should be ascertained by a jury to be summoned by a warrant of the Lord Mayor to the Sheriffs of the City of *London*.

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(1) 1 Sim. (N.S.) 260.

In the year 1852 the corporation gave notice of their intention to purchase Miss *Tugwell's* property. A claim was sent in to them on her behalf signed by one *Humphry Tugwell,* who was her uncle, and who purported to act for her. He also instructed a surveyor to assess on her behalf the purchase and compensation money to be paid by the corporation for the property. The amount was assessed accordingly by the surveyor so appointed and another surveyor appointed by the corporation at the sum of £4468 15*s.*

In 1854 the corporation paid this sum of £4468 15*s.* into Court, to the credit of "*Ex parte* the Mayor, Commonalty, and Citizens of the City of *London,* in the matter of the *Clerkenwell Improvement Act,* 1851," and took possession of the property. By an order of the Court of Chancery dated the 20th of January, 1855, and made on the petition of Miss *Tugwell* by a next friend, entitled in the matter of the *Lands Clauses Consolidation Act,* 1845, in the matter of the Act of 1851, and in a suit of *Tugwell* v. *Tugwell,* which related to the estate of the testator under whose will Miss *Tugwell* became entitled to the property, it was directed that the £4468 15*s.* should be invested in New 3 per cent. Annuities, in trust in the matter "*Ex parte* the Mayor, Commonalty, and Citizens of the City of *London*; the account of *Phœbe Tugwell,* a person of unsound mind," and the dividends thereon paid to two of the Defendants to the suit to be applied by them for the benefit of Miss *Tugwell.* The money was afterwards invested in the purchase of £4850 14*s.* 10*d.* New 3 per cents. In the year 1860 Miss *Tugwell* was found a lunatic by inquisition, and *Humphry Tugwell* was appointed committee of her estate. On the 5th of July, 1861, an order was made by the Lords Justices in Lunacy and in Chancery, on the petition of *Humphry Tugwell* as committee, that the dividends from time to time to accrue on the stock should, until further order, be carried to the credit of the matter of "*Phœbe Tugwell,* spinster, a person of unsound mind," and when so carried over should be from time to time paid to *Humphry Tugwell* as committee. Miss *Tugwell* died on the 26th of January, 1884, intestate.

The present petition was presented by the heir-at-law of Miss *Tugwell* asking a declaration that the sum of New 3 per cents.

was, at the death of Miss *Tugwell*, of the nature of real estate, and accordingly passed to him as her heir-at-law, and that, subject to duty, the same might be transferred to him.

No conveyance of the property to the corporation had been executed.

Vernon R. Smith, for the heir:—

There could be no conversion of the land into money as the lunatic was incapable of assenting to it. The heir is, therefore, entitled to the fund.

Northmore Lawrence, for the administrator of the deceased lunatic:—

Ex parte Flamank (1) is on all fours with the present case, and shews that the land has been converted into personalty. Sect. 7 of the *Lands Clauses Consolidation Act* enables all persons seised of lands, though under disability, to sell. No doubt it expressly mentions committees of lunatics, but that does not apply to a lunatic not so found by inquisition. The general power to sell is not, however, limited to the persons particularly named in the section. The lunatic was competent to sell or she was not, and in either view *Ex parte Flamank* is a direct authority that the money belongs to her personal representative. *Kelland* v. *Fulford* (2) and *In re Barker* (3) are distinguishable.

Sir *Arthur Watson*, for the corporation:—

We have not yet got a conveyance, and the Court will not part with the money until the conveyance is executed. The committee has confirmed the sale so far as he can.

Vernon R. Smith, in reply:—

Ex parte Flamank is distinguishable; there the sale was made under the compulsory powers of the Act, and the money was dealt with under sect. 78. In the present case the purchase-money must be treated as having been ascertained and paid into Court under sects. 9 and 69, the compulsory clauses of the

(1) 1 Sim. (N.S.) 260.
(2) 6 Ch. D. 491.
(3) 17 Ch. D. 241.

Lands Clauses Consolidation Act not being incorporated with the special Act. The distinction is pointed out in *In re Harrop's Estate* (1). Here the lunatic's uncle acted as a trustee for her, and the right course was adopted under sect. 69. Even if the land was wrongly taken in the first instance, still the heir is entitled to it, and is entitled to the purchase-money if he is willing to take it. The Court in Lunacy has power to confirm contracts for the sale of the land of a lunatic, and it is not the practice of that Court to alter the character of a lunatic's property. The order of July, 1861, which was made in the presence of the committee, was in substance a confirmation of the sale.

Northmore Lawrence :—

The payment cannot have been made under sect. 69; the uncle was neither guardian nor committee of the lunatic.

June 11. PEARSON, J. :—

This petition raises a question as to the title to some money which was paid into Court by the corporation of *London* under the *Clerkenwell Improvement Act*, 1851, as the purchase-money of some real estate belonging to a lady who was of unsound mind, though not so found by inquisition. [His Lordship stated the facts, and continued :—] The Petitioner is the heir-at-law of the lunatic, and the question is whether he, as representing the land of the lunatic, is entitled to the fund, or whether her personal representative is entitled to it as part of her personal estate. At first I thought the matter was too plain for argument, because the general rule is that you cannot change the character of the property of a person of unsound mind, unless there is some statutory power enabling you to do so. In the present case the heir is before the Court, and he is quite willing to confirm the sale, and he asks that the purchase-money may be paid to him under these circumstances. I am extremely surprised to find that there can be any doubt about his title. But Mr. *Lawrence* has very properly called my attention to the decision of Lord *Cranworth*, when Vice-Chancellor, in *Ex parte Flamank* (2), and I agree that that decision seems to cover the present case. But, having read it

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(1) 3 Drew. 726.

(2) 1 Sim. (N.S) 260.

PEARSON, J.
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very carefully, I am compelled to say that I am utterly unable to follow it. With all respect for Lord *Cranworth*, looking at the reasons which he gives for his judgment it seems to me utterly impossible to say that any title to the money had been acquired by the personal representative. In that case, as in the present, land belonging to a person of unsound mind not so found by inquisition had been taken under the *Lands Clauses Act*, and the purchase-money had been paid into Court. After the death of the lunatic the question arose whether the money was to be treated as real or as personal estate, and Lord *Cranworth* held that it was personal estate. He said (1): "Now did sect. 7 authorize *Cross* (the lunatic) to sell or did it not? If it did, the effect, in my opinion, was to make his contract as good as if he had been *compos mentis;* and his executrixes would clearly be entitled to the £740. He was compelled to sell; but, when he had sold, he stood in the same situation as he would have been in, if he had been *compos mentis* and had sold voluntarily." Now, looking at the terms of sect. 7, I am unable to come to the conclusion that it authorizes, or was intended to authorize, or that it can be construed as enabling, a person of unsound mind himself to do that which he would otherwise have been incapable of doing. Inasmuch as that section says that the persons who are to be able to sell the lands of lunatics or idiots are, not the lunatics or idiots themselves, but their committees, it seems to me impossible to conceive that it could have been intended that a person who from his condition of mind was absolutely incapable of entering into any agreement should be able to enter into an agreement to sell his land. There are, moreover, other sections in the Act which point out what is to be done in such cases. Following therefore, as I am bound to do, my own judgment, I am of opinion that sect. 7 did not authorize Miss *Tugwell* to sell the land to the corporation. Then Lord *Cranworth* continued (1): "If he was not authorized to sell, and, therefore, the company were not justified in taking his land under the compulsory powers of the *Lands Clauses Consolidation Act*, still the devisees under his will cannot be entitled to the money. Their claim would be to the land, and not to the money. And it does not lie in the mouth of the company to make the objection; for they have taken the land, and, therefore, they cannot say that there was no authority to take it. Therefore I can deal with the money in no other way than as if it had been paid for the purchase of land sold by a person seised in fee, and who was competent to sell it." I have read that passage over a great many times, and, with all respect to Lord *Cranworth*, I find it impossible to understand how he could have arrived at such a conclusion. The purchase-money was in Court, and the heir, who could have brought ejectment for the land, was willing to accept the money and to confirm the sale, and yet Lord *Cranworth* arrived at the extraordinary conclusion that the money must be handed over to persons who could not make out any title to it or to the land. The land might be taken from the company because they had bought it from the wrong person, and the money must be taken away from them because they could not be heard to say that they had not bought from the right person. I cannot understand why a Court of Equity, having the money in its hands, should not be able to say, "A mistake having been made, which is capable of being set right by paying the money to the rightful owner of the land who is willing to accept it, let justice be done by paying the money to him." I decide, therefore, that the fund in Court must be transferred to the heir. The corporation must pay the costs of the petition.

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(1) 1 Sim. (N.S.) 267.

Sir *Arthur Watson*:—The costs ought to be limited to such costs as would have been incurred if the application had been made in Chambers.

PEARSON, J.:—The question was involved in great difficulty by reason of Lord *Cranworth's* decision. There will be the usual order that the corporation pay the costs according to the Act. I intend the personal representative to have his costs.

Solicitors for Heir and Administrator: *Wood, Bigg, & Nash.*
Solicitor for Corporation: *City Solicitor.*

W. L. C.

In re TWEEDIE AND MILES.

[1884 T. 593.]

PEARSON, J.
1884
May 23.

Vendor and Purchaser Act—Trust for Sale—Trust exercisable without Consent of Cestuis que Trust.

Real property was vested in trustees upon trust at the request of *A.* and *B.* and the survivor, and after their death at discretion, to sell and hold the proceeds upon trust for *A.* and *B.* successively for life, and then for the children equally. After the deaths of *A.* and *B.* there were three adult children:—

Held, that the trust for sale was not spent, but was exerciseable by the trustees without the concurrence of the beneficiaries.

THIS was a summons under the *Vendor and Purchaser Act*, in which the vendor of a freehold house, called *Batt's Hotel*, in *Dover Street*, asked for a declaration that the purchaser was not entitled to require the beneficial title to the property comprised in the contract for sale to be abstracted, and that the purchaser's objection that the vendor could not sell without the concurrence of the beneficiaries under a settlement, dated the 11th of April, 1863, was not a valid objection to the applicant's title, and that the trust for sale comprised in such settlement was not spent, but was exercisable at the present time without the consent or concurrence of anyone.

By the settlement of the 11th of April, 1863, after recitals whereby it appeared that the property in question had been conveyed by way of sale unto and to the use of *J. Gould* and *E. Horne*, in fee simple, to the intent that they should hold the same upon the trusts thereinafter contained, and that *Henry* and *Amelia Bateman* had married on or about the 4th of April, 1847, and that *Amelia Bateman* had a son by a former marriage then living, and that there were also two children then living by her marriage with *Henry Bateman*, it was declared that the said *J. Gould* and *E. Horne* and their heirs should stand seised of the hereditaments and premises so conveyed to them, upon trust that they or the survivor of them, or the heirs of such survivor, or other the trustees for the time being of the said settlement, should at the request in writing of *Henry Bateman* and *Amelia Bateman* during their joint lives, and of the survivor during his or her life, and after the death of such survivor at the discretion of the said trustees or trustee for the time being, sell the said hereditaments and premises thereinbefore described, or any of them, with or without any special or other stipulations as to title, and should with the consent of the said *Henry Bateman* and *Amelia Bateman*, and the survivor of them during their or his lifetime, and after the decease of the survivor at the discretion of the said trustees or trustee for the time being, lay out and invest the moneys to arise from or be produced by such sale in the securities therein mentioned, and should pay the annual income of the said trust moneys, stocks, funds, and securities unto the said *Amelia Bateman* and her assigns for life for her separate use, and after her decease to the said *Henry Bateman* for his life, and after the decease of the survivor of them should stand possessed of the said funds and the annual income thereof in trust for the said three children, sons, at twenty-one, or daughters at twenty-one, or marriage, with an ultimate trust on failure of such children attaining twenty-one for the next of kin of Mrs. *Bateman*.

Henry Bateman died on the 20th of January, 1878, and Mrs. *Bateman* predeceased him, and the three children had long since attained the age of twenty-one.

The property was sold by auction on the 20th of February, 1884, and one of the conditions of sale was as follows: "The vendor sells and will convey as trustee for sale, and the concurrence of the persons beneficially interested shall not be required."

The purchaser having taken an objection to the title on the ground that the trustee had no longer the power of selling without the assent of the beneficiaries, that question was now raised upon this summons.

J. G. Wood, for the vendor, in support of the summons:—

The property comprised in the settlement of April, 1863, was vested in the trustees in fee, and they had a trust for sale and not a mere power of sale. The interests of the beneficiaries was only in the proceeds of the sale, and it is immaterial whether they have or have not acquired vested interests. The estate is converted into personalty, and the *cestuis que trust* are only entitled to shares of the proceeds, and any one of them might insist upon the trust for sale being carried out. It is true that if all of them, being of age, agreed to call upon the trustees to convey the estate to them, there would be a reconversion into real estate, but at present the trustees have a trust for sale and conversion which they are bound to carry out. This case is covered by the authority of *Biggs* v. *Peacock* (1).

Theobald, for the purchaser:—

As the two tenants for life under the settlement are dead, and all the *cestuis que trust* have obtained an absolute vested interest in possession, the trust for sale is not now exercisable. There is no indication in this deed that the trust is to continue, it is, therefore, now spent. The case of *Biggs* v. *Peacock* does not apply, because there the tenant for life was still living. A power of sale comes to an end when the estates are absolutely vested in possession, and it is on this ground that an unlimited power of sale is not void for perpetuity. There is no distinction for this purpose between a power and a trust. An unlimited trust for sale is valid only because the settlement itself enforces a limit, that is to say, when all the interests have absolutely vested in possession as they have here, the trust is spent.

[*Peters* v. *Lewes and East Grinstead Railway Company* (2) was also cited.]

PEARSON, J.:—

In the case cited by Mr. *Theobald* there was only a power of sale given to the trustees for the purpose of division. It was not a trust for sale which was imperative. No doubt if all the children, having become absolutely entitled, chose to require the trustees to convey the property to them, there would then be a reconversion of the property into real estate. Here there is a trust purposely inserted in the settlement in order that the property may be sold and the proceeds divided, and to hold that that is a trust which is obnoxious to the rule against perpetuities

(1) 22 Ch. D. 284.

(2) 18 Ch. D. 429.

would be to introduce a rule which has never yet been laid down. Here the trust is to sell with the consent of the tenants for life, and after their death to divide the property between the three children of Mrs. *Bateman*, at twenty-one or marriage, and a sale would, under the circumstances, be the most proper mode of effecting a division. If I were to accede to the argument that the trustees have no longer any power to sell, then in all similar cases the trust for sale would be gone altogether. My opinion is, that the delay in exercising the trust has not been so unreasonable as to enable me to say it is now incapable of being exercised. On the contrary, I think it can and ought to be exercised.

I must therefore declare that the trust for sale is exercisable, and the purchaser must pay the costs of this application.

Solicitors: *Oliver Richards; A. F. & R. W. Tweedie.*

T. W. G.

PEARSON, J.
1884
May 19;
June 11.

In re WATTS.
CORNFORD *v.* ELLIOTT.

[1883. W. 1615.]

Mortmain—Bequest to Charity—Impure Personalty—Interest in Land—Mortgage of Interest in Trust Fund invested on Mortgage of Real Estate—9 *Geo.* 2, *c.* 36 [*Revised Ed. Statutes, vol. ii., p.* 403.]

A testator gave the residue of such part of his personal estate as could by law be bequeathed for charitable purposes on trust for charities. At the time of his death his personal estate comprised: (1.) A sum of £100 due to him on the security of a mortgage of the life interest of a lady under the will of her father in the sum of £3000. The £3000 was invested in the names of the trustees of the father's will on a mortgage of real estate; (2.) A sum of £800 due to the testator on a mortgage of the life interest of a widow lady in the funds subject to the trusts of her marriage settlement, and of the vested reversionary interest of one of her two daughters in a moiety of those funds. The greater part of the trust funds was invested in the names of the trustees of the settlement on mortgage of real estate; (3.) A sum of £200 due to the testator on the security of a mortgage of the same life interest, and of the vested reversionary interest of the other daughter in the other moiety of the trust funds:—

Held, that, under the mortgage to secure the £100 the testator took no interest in land, and that the £100 could be legally bequeathed by him to charitable purposes.

But *held*, that the other two mortgages must be looked at together, and that as, by foreclosing them both, the testator could have acquired the whole trust fund in its state of investment on mortgage of real estate, he had by virtue of the two mortgages an interest in land, and the two mortgage debts could not be legally bequeathed to charitable purposes.

SPECIAL CASE.

William Watts, by his will, dated the 22nd of December, 1873, appointed the Defendants his executors, gave pecuniary legacies to several charitable institutions, and directed that the charitable legacies should be paid out of such part of his personal estate as was by law applicable to charitable purposes. And by a codicil dated the 2nd of May, 1878, the testator gave the residue of such part of his personal estate as could by law be bequeathed for charitable purposes to his trustees and executors, upon trust for certain charities.

The testator died on the 10th of October, 1880. At the time of his death his personal estate consisted in part of the following particulars:—

1. A sum of £100 due to the testator from *C. G. F. Mevins* and his wife, and secured to him by a mortgage of the life estate of Mrs. *Mevins* in a sum of £3000 derived under the will of her father and a policy of assurance on her life. The father's will authorized the investment of the £3000 on (among other securities) real security, and the £3000 was, both at the time when the mortgage of the life interest to the testator was executed and at the date of his death, invested in the names of the trustees of the father's will on mortgage of some freehold houses.

2. A sum of £800 due to the testator from *Maria Smith,* widow, and *Maria Margaret Morison,* her daughter, and secured to him by a mortgage of the life estate of Mrs. *Smith,* and the half share of Mrs. *Morison,* expectant on the death of Mrs. *Smith,* in the trust funds settled by Mrs. *Smith's* marriage settlement. That settlement authorized the investment of the trust funds comprised in it on (*inter alia*) real security, and, both at the time of the execution of the mortgage to the testator and at the time of his death, the greater part of the trust funds was invested in

the names of the trustees of the settlement on mortgage of real estate.

3. A sum of £200 due to the testator from Mrs. *Smith* and *Charlotte Isabel Smith,* her other daughter, on the security of a mortgage of the life estate of Mrs. *Smith,* and the half share of Miss *Charlotte Smith,* expectant on her mother's death, in the trust funds settled by Mrs. *Smith's* marriage settlement. Both at the date of the mortgage to the testator and at the time of his death, the greater part of the trust funds was invested in the names of the trustees of the settlement on mortgage of real estate.

The question for the opinion of the Court was whether these three sums of £100, £800, and £200, respectively, could at the time of the testator's death be legally bequeathed by him to charitable purposes.

The Plaintiff was the treasurer of one of the charities mentioned in the codicil, and he had been appointed by the Court to represent the other charities; the Defendants were the executors.

Vernon R. Smith, for the Plaintiff:—

As to the mortgage for £100, the testator by virtue of it took no interest in land. *Brook* v. *Badley* (1) may be relied on against me, but it does not apply.

In the present case the testator could in no event acquire the land: *Shadbolt* v. *Thornton* (2). The land could never become vested in the charities. If they foreclosed their mortgage they would only obtain a right to call on the trustees of the fund to pay the income to them; the charities would have no direct interest in the land: *In re Harris* (3). In order that the statute may apply, it is essential that the charity should in some possible event be in a position to deal with the land itself.

Yate Lee, for the Defendants:—

The true test is not whether the charity can become entitled to the land; the Act uses the words "estate or interest therein."

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(1) Law Rep. 3 Ch. 672.

(2) 18 L. J. (Ch.) 392.

(3) 15 Ch. D. 561.

The question is whether the testator's interest under the mortgage was an estate or interest in land, or a charge or incumbrance affecting land: *Ashworth* v. *Munn* (1). In that case the charity could by no possibility have got the land itself. *Brook* v. *Badley* (2) exactly applies. In the present case, by the operation of successive foreclosures, the charities might be the hands to receive the income of the real estate. But the test is whether what the testator bequeathed was an interest in land: *In re Robson* (3).

Vernon R. Smith, for the Plaintiff:—

As to the mortgages for £800 and £200, the true test is whether the case is within the objects of the Act as defined by the title and the preamble, which was to prevent land from being rendered inalienable: *Attree* v. *Hawe* (4); *In re Robson*. Trying it by that test it is clear that the statute does not apply.

Yate Lee, for the Defendants:—

These two mortgages are more clearly within the Act than the first.

PEARSON, J. (after stating the effect of the will, continued:—)

The question is whether certain parts of the testator's personal estate are interests in land, so as to come within the provisions of the *Mortmain Act*. Three classes of property are mentioned in the special case, but they may, I think, be reduced to two. The first is a sum of £100 which was due to the testator on the security of a mortgage of the life estate of a Mrs. *Mevins* under the will of her father in a sum of £3000, which was at the date of the mortgage to the testator invested on a mortgage of real estate. All that the testator took by the mortgage to him was the income of the £3000. He did not take any real interest in the original mortgage; he had simply the right to take the income arising from the investment. He could not by foreclosure or otherwise acquire any interest in the real estate itself. It would be stretching the doctrine which has been laid down too

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(1) 15 Ch. D. 363.
(2) Law Rep. 3 Ch. 672.
(3) 19 Ch. D. 156.
(4) 9 Ch. D. 337.

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far to say that the interest which he took is an interest in real estate within the statute.

The other two sums must, I think, be regarded together, for they were the subject of securities on the same trust funds. A widow lady is entitled for her life to the income of certain trust funds, of which a considerable part is invested on mortgage of real estate, and, subject to her life interest, her two daughters are entitled to the trust funds in moieties. By one deed the mother mortgaged her life estate, and one of the daughters mortgaged her moiety, to the testator to secure £800, and by another deed the mother mortgaged her life estate, and the other daughter mortgaged her moiety, to the testator to secure £200. It appears to me that by virtue of these two mortgages the testator had the control over the whole of the trust funds; he might have foreclosed both mortgages and thus have acquired the property in the state in which it was actually invested. Having regard to the decided cases, I must hold that under these circumstances he had an interest in land. He might (not necessarily) but by possibility have made himself master of the whole trust fund in condition of a mortgage of real estate, and that, according to the authorities, is enough to bring the case within the statute.

Solicitors for Plaintiff and Defendants: *Peacock & Goddard.*

W. L. C.

PEARSON, J.
1884
June 13, 19.

In re CARRIAGE CO-OPERATIVE SUPPLY ASSOCIATION.

Company—Qualification of Directors provided by Promoter—Joint and several Liability.

The first five directors of a company being bound by the articles of association to hold twenty shares each as a qualification, accepted, with the knowledge and approval of each other, twenty fully paid shares each from the promoter who had received them as cash from the company:—

Held, upon summons by the official liquidator in the winding-up, that all the directors were jointly and severally liable to pay the full value of the shares.

One only of the five directors, upon finding that he was not justified in receiving the shares without payment, offered to pay the full sum due from him, and gave a cheque for the amount, which, however, was accepted as an advance to the company, and was added to previous advances made by him for preliminary expenses:—

Held, that this director was not at liberty to set off the value of his shares against the amount paid in respect of advances, though he would have a claim against the company for those advances.

THIS was a summons by the official liquidator in the winding-up of the *Carriage Co-operative Supply Association* claiming that the Earl of *Perth* and *Melfort*, Colonel *James Dillon Macnamara*, *Edwin Canton*, *Frederick Oswin*, and Major-General *George Ricketts Roberts*, who were the original directors of the company, might be ordered jointly and severally to pay to the liquidator the sum of £500, being the nominal amount of twenty shares transferred to each of them respectively by *George Septimus Smith*, the promoter of the company, and that the said five directors be ordered to pay the costs of this application.

The summons was now heard as against General *Roberts* only, at whose instance it was adjourned into Court. The facts in connection with the formation of this company were these:—

On the 19th of May, 1880, an agreement was entered into between *William Catt* and *James William Boyfield*, coach builders, of the first part, *George Septimus Smith*, a promoter of this company, then about to be formed, of the second part, and *Thomas Meldrum Dobie*, as trustee for the company, of the third part.

The agreement, as far as it is necessary to be stated, was an agreement by which Messrs. *Catt & Boyfield* agreed to grant an underlease to the proposed company, and it recited "And whereas the said *George Septimus Smith* has agreed to find, provide and pay all the preliminary expenses of and incident to the formation of the said intended company, and the obtaining subscriptions for the capital thereof up to the first allotment of shares, and in consideration thereof the said *William Catt* and *James William Boyfield* have, with the privity of the said *Thomas Meldrum Dobie*, for and on behalf of the said intended company, agreed to pay and allot to him out of the cash to be paid and the shares to be allotted or issued to them as hereinafter mentioned the sum of money and shares hereinafter mentioned. Now it is hereby agreed by and between the said parties as follows." Mr. *Smith* then undertook to establish the company. The capital of the company was to be £100,000, in 20,000 shares of £5 each, and Messrs. *Catt & Boyfield* agreed with the trustee to grant to the intended company an underlease of premises which they held on lease for sixty-one years at an annual rental of £950 payable quarterly, in consideration of the premium or sum of £7500 to be paid by the intended company to Messrs. *Catt & Boyfield* in the manner hereinafter mentioned, that is to say:—"As to the sum of £5000, part thereof, in cash, and as to the sum of £2500, residue thereof, by the allotment and issue to the said *William Catt* and *James William Boyfield*, or their nominees, of 500 fully paid-up shares in the said intended company, of £5 each."

The 10th and 11th paragraphs of the agreement stated that out of the sum of £5000 paid or to be paid to Messrs. *Catt & Boyfield*, Messrs. *Catt & Boyfield* would pay Mr. *George Septimus Smith* the sum of £3000 in cash, and would transfer or cause to be allotted and issued to him or his nominees 300 fully paid-up shares of £5 each in the said intended company so agreed to be allotted and issued to Messrs. *Catt & Boyfield*; and the company were to be at liberty to pay to *George Septimus Smith* the sum of £3000 and to allot and issue to him the 300 shares, and his receipt for the money and the shares should be a discharge to them as between the company and Messrs. *Catt & Boyfield*.

At the time this agreement was entered into the articles of association were framed, and by the second of those articles the several gentlemen who were Respondents to this summons were named as the first directors of the company, and by the next section of the articles it was provided that every director so appointed should within three months after his appointment, as a necessary qualification for such appointment as director, hold at least twenty shares in the company, which might be shares originally issued as fully paid-up shares or otherwise; and if any director should cease to hold in his own right the amount of capital requisite for his qualification, his office should thereupon become vacant.

On the 19th of May, the day on which the agreement was signed, a meeting of the directors took place at which the articles were accepted, and the company was registered on the 26th of May.

What subsequently took place was this:—Just before the expiration of the three months from the registration of the company it was intimated to the directors by Mr. *Chinery*, who also acted as a promoter of the company, that it was necessary for them to obtain their qualification and to be the holders of twenty shares each, and that they might effect this by accepting from Mr. *Smith* a transfer of twenty of the fully paid-up shares allotted to him, and that he was willing to carry out that arrangement. Accordingly the directors, believing from the advice of Mr. *Chinery* and the solicitor of the company that they were legally authorized to take the shares, accepted the proposal, and the transfer of twenty shares was made to each of them by Mr. *Smith*, these shares being part of the 300 fully paid shares which had been allotted to Mr. *Smith* in pursuance of the agreement of the 19th of May. Then, in February, 1881, it was intimated to General *Roberts* that he and his co-directors were not justified in accepting the twenty shares each as they had done, without payment, and General *Roberts* thereupon offered at once to pay the sum of £100 for his shares, and he urged upon his co-directors the propriety of adopting the same course. They, however, while admitting their liability, declared that their pecuniary means would not enable them to pay the money, and they never had done so. General *Roberts*, however, handed over to Mr. *Chinery* a cheque for £100, which he stated in his affidavit to have been intended as his payment for the shares, but in fact the money was entered in the shape of a further advance by way of loan to the company, and not as payment for the shares. It appeared also that previous advances to the amount of £520 had been made to the company from time to time by General *Roberts*.

Upon these facts, which were contained in the affidavits, the summons came on for hearing.

Cookson, Q.C., and *H. B. Buckley*, for the official liquidator:—

There can be no doubt whatever that the directors who received these shares from the promoter of the company in order to qualify them as directors were guilty of misfeasance, and are liable under the 165th section of the *Companies Act* of 1862, for the amount of those shares. This was decided in *Pearson's*

Case (1), which was a case on all fours with the present case, and there was a similar decision in *In re De Ruvigne's Case* (2). Then as to the joint and several liability of the directors, there is first the case of *In re Englefield Colliery Company* (3), where there was an agreement between the promoter of the company and the directors that the directors should receive their shares without any payment, the amount of the shares being paid by the promoter out of the moneys paid to him by the company for preliminary expenses, but which preliminary expenses were, in fact, paid without inquiry, and were well known to include the directors' shares. It was there held that the directors were jointly and severally liable to repay to the company the sum so ordered to be paid to the promoter for preliminary expenses, on the ground that the money was, in fact, paid in order to provide the directors' qualification. The joint liability was also maintained in the case of *Ex parte Pelly* (4), and that case is also an authority to shew that there can be no set-off on the part of General *Roberts* in respect of the money advanced by him to the company for expenses.

General *Roberts* was a director from the original formation of the company, and attended all the meetings held by the directors. The agreement was sanctioned by him, and he was party to the allotment of shares. When the directors received each of them twenty shares to constitute their qualification, he consented to the transaction, and joined with the other directors in accepting the shares, and he is therefore liable jointly with the other directors for the value of those shares.

Then as to the set-off by General *Roberts* of the money advanced by him to the company, there is no evidence that any portion of this money was advanced by way of payment for his shares. The money appears to have been paid to Mr. *Chinery* for the expenses incurred by the company, and though General *Roberts* may have a claim against the company for the money so advanced, he is still liable, not only for the £100 which he ought to have paid for his shares, but he is liable also jointly and severally with the other directors for the remaining £400 which they ought to have paid.

(1) 4 Ch. D. 222.

(2) 5 Ch. D. 306.

(3) 8 Ch. D. 388.

(4) 21 Ch. D. 492.

Cozens-Hardy, Q.C., and *W. B. Heath*, for General *Roberts*:—

This is an extremely hard case upon General *Roberts*, upon whom no moral blame whatever can be suggested. It is true that his name appears as one of the first directors, but he did not actually join the company until the agreement had been prepared and settled by the solicitor of the company. There is no wonder that he had faith in the imposing list of names of directors and persons connected with the formation of the company, and that he trusted to their experience in managing the business part of the transaction. He was assured by those who were better acquainted with the management of companies than he could be, that the articles were expressly drawn so that the directors might hold "shares originally issued as fully paid-up shares or otherwise," to constitute their qualification, but when he found out that he could still be made liable to pay for his shares, he at once offered to do what he would have done at first if he had not been wrongly informed, and we have evidence that at that very meeting he handed over a cheque for £100, which could only have been by way of payment for his shares. If it was called an advance of £100 to the company it was still payment for the shares, and there is good reason for saying so when we have it admitted that he urged his co-directors to do as he had done, which was to pay for his shares. If he had for a moment supposed that the £100 would be set down as an advance to the company he would naturally have had the mistake corrected, but the principal subject discussed at the meeting was the payment for the shares, and the fact that General *Roberts* considered himself bound to make that payment.

Then as to the joint and several liability of all the directors to pay the whole £500, this case differs from the authorities cited, in this respect—that the moment the subject was brought to the attention of General *Roberts* he at once offered to correct the mistake he had been led into. He saw that he had done wrong, and refused to join with his co-directors in accepting the shares. He corrected the mistake himself, and urged his co-directors to do the same.

June 19. PEARSON, J. (after stating the clauses of the agreement of the 19th of May, 1880, and referring more particularly to the terms upon which the sum of £7500 was to be paid, partly in cash and partly in fully paid shares, to Messrs. *Catt & Boyfield*, and also to the terms upon which the sum of £3000 was to be paid to Mr. *Smith*, partly in cash and partly in fully paid shares, continued:—)

I have read these clauses because they shew most distinctly that these shares were allotted and taken as cash and in lieu of their par value. On the 19th of May, 1880, the day on which this agreement bears date, of course the company was not in existence, but at that time the articles, as I gather it, had been framed; and by the second of those articles the several gentlemen, whose allocation of shares to themselves is now called in question, were named as the future directors of the company; and by the next section of the articles it was declared that every director must take or hold, within three months after their accepting office, twenty shares in the company.

On the same 19th of May there was a meeting of those gentlemen who were to be directors of the company, including General *Roberts*, and they accepted the articles, and they accepted the agreement. The company was registered, and the transaction was completed on the 26th of May.

It is quite plain, therefore, as General *Roberts* was a party to what was done before the company was registered, and inasmuch as from the time when the company was registered he acted as a director, he perfectly well knew what was in the agreement, and must be held to have known also the terms under which he came under the articles of association.

What happened was this. The 300 shares mentioned here were allotted in due course to Mr. *Smith*, and just towards the end of the three months from the establishment of the company it was intimated by Mr. *Chinery*, who took an active part in getting up this company, to the directors, and amongst others to General *Roberts*, that the time during which they were to obtain their qualification was on the point of expiring, and that it was absolutely necessary, therefore, that they should obtain that qualification. Thereupon, acting upon the advice, General *Roberts* says, both of Mr. *Chinery* and of the solicitors of the association, and believing that he was doing that which he was lawfully authorized to do, he and his brother directors sitting together round the table accepted from Mr. *Smith* a transfer to each of them of twenty shares, part of the 300 shares which had been given to Mr. *Smith* for promotion. There was no consideration of any sort given by the directors for those shares. They were simply transferred to them, and General *Roberts* says, and I believe him, that he was induced to do this because he relied on what he was informed was the opinion of the solicitors, that he could do it properly, and because of the unanimous consent of his brother directors to take the shares in this way. So matters went on for some time, and at last, somewhere about February, 1881, it was intimated to General *Roberts* that in accepting a transfer of part of those shares which had been given to Mr. *Smith* for promotion he had done that which he had no right to do, and that if the shares were to come back to the directors they must come back for the benefit of the company, and that the directors who had taken part in accepting this agreement on behalf of the company could not by any possibility take advantage of the premium, if I may so call it, that was to be paid for promotion to Mr. *Smith*, to put into their own pockets money or shares that were really the property of the company if they came back at all. General *Roberts*, upon having this brought clearly before him, saw that what was stated was right. Being an honourable man, and desiring to act honourably, he at once said that he regretted exceedingly that he had *per incuriam* done that which he found he ought not to have done, and that he was perfectly prepared to pay for those twenty shares, and he remonstrated with his brother directors, and said, of course if I pay for mine you ought to pay for yours, and I trust you to pay for your shares, and he called upon them to do so. According to General *Roberts*' statement his brother directors admitted at once that they were bound to pay for them, but pleaded want of means, and they never did pay. It is admitted by General *Roberts*' counsel at the Bar, that General *Roberts* is liable to pay for those shares which were transferred to him as fully paid-up shares. That is not in dispute on the present occasion. General *Roberts* has never disputed it, be it said to his credit, and his counsel are not now instructed to dispute it.

The question with regard to the payment of those shares depends

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on the fact whether or not General *Roberts* ought to be deemed to have paid for them already. He says, and I believe him, that when he found that he ought to pay for his shares, having at that time advanced £520 to the company, he said, set off £100, which I ought to pay in regard to those shares, against the £520 which you now owe me, and, as far as I can gather from his affidavit and from the minute book, that must have been done somewhere about the 25th of February; because he states that it was at a board meeting between the middle and the end of February, and the only board meeting that I can find is on the 25th of February. Curiously enough on that very same day he advanced a further sum of £100 to the association, making therefore, assuming it all to be a debt, a debt due from the association to him of £620. Now, I do not hesitate to say, nor will the counsel for the liquidator deny for one moment, that if on the 25th of February he had said, you are in want of money, I owe you £100 for the shares, I will pay £100 for those shares at once, and you will then have £100 in your coffers, there would have been payment, and there would have been an end of the case so far as regards General *Roberts*' own shares. Unfortunately that was not done. Unfortunately the cheque, I imagine, for I can only speculate upon it, looking at the minutes of the board of that meeting, must have been drawn by General *Roberts* at the beginning of that meeting, and was drawn as an advance to the company and simply as an advance. The conversation, I should gather, for there is no record of it, nor was there likely to be, must have taken place at the end of the meeting, and after that advance. Unfortunately for General *Roberts*, and I myself regret it, I am obliged to come to the conclusion that there was nothing but mere conversation about General *Roberts*' willingness to set off part of his advance to the company against £100 which he had to pay upon his shares. There was never anything concluded in respect of that matter. At the time when the company came to be wound up it rested in this way, that there was £100 due from General *Roberts* with respect to these shares, and there was £620 due from the company to him in respect of advances.

Then, upon the authorities, it has been decided that General *Roberts* has no right to set-off, and I am compelled to come, therefore, to the same conclusion that the Vice-Chancellor and the Court of Appeal came to in *Ex parte Pelly* (1), and I must decide that General *Roberts* can only be a creditor of the company for £620, but is liable now to pay this £100 to the company.

The other question is this: there were four other directors who accepted in the same way, and on the same day, and at the same time, and all in the presence of each other and of General *Roberts*, a transfer to each of them of twenty shares in the same way that General *Roberts* did, and unfortunately those gentlemen have never paid for those shares. That they are liable to pay for them is beyond dispute. The question is whether or not General *Roberts* is liable also with them, whether they are all jointly and severally liable, or whether each director is only liable to pay in respect of his own shares. I have, with regret and after consideration, come to the conclusion that they are jointly and severally liable, I say with regret as regards General *Roberts*, because I am satisfied, from the whole statement of the case, that General *Roberts* did not intend to do anything that was wrong, still less anything that was fraudulent. I am satisfied that he intended to act as a man of honour in the transaction, and I regret, therefore, being obliged to come to the conclusion that all the directors are jointly and severally liable for what is due in respect of those shares, and it was for that reason that I called attention to the article in the agreement which shews most distinctly that these shares were taken as cash. They were taken in part payment of the £7500, which was the sum that was to be paid.

Now, if instead of shares Mr. *Smith* had given £100 to each of these gentlemen, and each of them had been responsible for the money that had been paid to Mr. *Smith*, I suppose there can be no doubt, looking to the decision in *In re Englefield Colliery Company* (2), and other cases, that each of the directors would be liable jointly and severally with the others for the whole sum that had been paid in that way. I really cannot make any distinction between the transfer of shares in that way and the payment of money. I think the transfer of shares is just the same thing, and that inasmuch as every one of the directors was a party to this transaction, by which these shares, which have not been paid for, were treated as fully paid-up shares, and were transferred to each of themselves, I think that each of them

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(1) 21 Ch. D. 492.

(2) 8 Ch. D. 388.

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now is responsible for the loss which the company may suffer by not having got the full amount paid for those shares. It is quite plain to me, at the time when that was done, these shares might have been allotted so as to obtain for the company the full amount of their nominal value.

This view of the case is, I think, in accordance with what Lord Justice *Mellish* said in *Hay's Case* (1): "That being so, it appears to me quite clear that when the company seek their redress from the agent who has so behaved, they have their choice, and can say that this cheque never became the property of *Prince*, but remains the property of the company, and therefore the sum due on the shares has never been paid; or if they thought it more for their interests, they might have said, 'You having paid this cheque nominally to pay up your shares, we will ratify that part of the transaction and hold your shares as paid, and then say that the money with which you paid for them was our money, and therefore you must pay that money back to us.' In my opinion, the consequence of a transaction of this nature is, that the *cestui que trust* has an election in which way he may choose to treat it. He is entitled to say that the calls are unpaid, and are now to be paid."

In the case before me *Smith* took the shares as money, and transferred them to the directors, who accepted them. The company, in my judgment, is entitled to say, you accepted £500 of our money from *Smith*, and divided it among yourselves, and you must repay it, and we will treat the shares as fully paid-up: or we will treat the shares as unpaid, and you, who have divided them among yourselves, must pay up what is due upon them.

Under these circumstances, I must make the order that General *Roberts* is jointly and severally liable for the whole, and in so doing I say emphatically that I hope the liquidator will endeavour to relieve General *Roberts* as far as he can from liability in respect of the other shares by enforcing payment from each of the other directors. The costs will, of course, follow the result. General *Roberts* may have two months for payment of the money.

Solicitors: *C. Harcourt*; *J. Vernon Musgrave.*

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(1) Law Rep. 10 Ch. 593, 605.

T. W. G.

In re NORRIS.
ALLEN *v.* NORRIS.

[1883 N. 167.]

PEARSON, J.
1884
June 30.

Power of appointing new Trustees—Retirement of Trustee—Validity of Appointment by continuing Trustee—Exercise of Power after Judgment for Administration of Trusts—Approval of Court—Solicitor of continuing Trustee.

When a power of appointing new trustees authorizes the continuing trustee or trustees to appoint a new trustee or trustees in the place of a trustee or trustees becoming unwilling to act, an appointment by a sole continuing trustee, in the place of a trustee who desires to retire, is valid; it is not necessary that the retiring trustee should join in making the appointment.

In re Glenny and Hartley (1) commented on, and *dicta* of *Bacon*, V.C., dissented from.

Travis v. *Illingworth* (2) approved and followed.

On the retirement of one of two trustees of a will, the continuing trustee, who was the solicitor to the trustees, appointed his son, who was his partner in his business, to be a new trustee. The trusts of the will were being administered by the Court:—

Held, that, without any reference to the personal fitness of the son, by reason of his position the appointment was one which the Court ought not to approve, though it would not have been invalid if the Court had not been administering the trusts.

ADJOURNED SUMMONS.

This action was commenced on the 9th of February, 1883, for the administration of the estate of *Adam Norris*, and the execution of the trusts of his will under the direction of the Court, so far as the same remained to be performed. The testator died on the 13th of October, 1853. The Plaintiffs were *J. J. Allen* and *G. H. Midwood*, the then trustees of the will. *J. J. Allen* was a solicitor, and a partner with his son *C. J. Allen* in the firm of *J. J. & C. J. Allen*, who were the solicitors for the Plaintiffs. They were also solicitors for some of the beneficiaries who were Defendants to the action. On the 7th of April, 1883, an administration judgment was pronounced, and on the 29th of April, 1884, an order was made giving the conduct of the proceedings to *John Boyd*, one of the beneficiaries, who was a Defendant.

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(1) 25 Ch. D. 611.

(2) 2 Dr. & Sm. 344.

The will of the testator, dated the 16th of July, 1853, contained a declaration that "if any of the trustees hereby appointed, or to be appointed as hereinafter mentioned, shall die, or decline or refuse or become unwilling or incompetent to act in the trusts of this my will before the same shall be fully executed, then, and as often as the same shall happen, it shall be lawful for my said daughters, and the survivors and survivor of them, during their or her lives or life, and that notwithstanding coverture, and, after the decease of the survivor of them my said daughters, it shall be lawful for the surviving or continuing trustee or trustees, by any deed or deeds to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or declining or refusing or becoming unwilling or incompetent to act as aforesaid, and to do all acts necessary for effectuating such appointment as occasion may require, and every trustee so to be appointed shall have all the powers and discretion of the trustee or trustees in whose place he shall be substituted." On the 3rd of July, 1856, *J. J. Allen* and *G. H. Midwood* were appointed by the testator's daughters trustees of the will in the place of the original trustees. The last surviving daughter of the testator died on the 5th of December, 1882.

By a deed dated the 26th of December, 1883, and made between *J. J. Allen* of the first part, *Midwood* of the second part, *C. J. Allen* of the third part, and *J. J. Allen* and *C. J. Allen* of the fourth part, after a recital that *Midwood* was unwilling any longer to act as a trustee of the will, and that *J. J. Allen* was desirous of appointing *C. J. Allen* to be a trustee of the will in the place of *Midwood*; it was witnessed that *J. J. Allen*, in exercise of the power vested in him by the will, and of every other power enabling him, did thereby appoint *C. J. Allen* to be a trustee of the will in the place of *Midwood*, jointly with *J. J. Allen*, for all the purposes for which *R. N. Hodgson* and *William Norris* (the original trustees) were appointed trustees jointly in and by the testator's will, and did direct and declare that all the hereditaments then subject to the trusts of the will, and which belonged beneficially to the testator, should forthwith vest in *J. J. Allen* and *C. J. Allen* in fee simple, as trustees of the will and as joint tenants, for the purposes and upon the trusts thereof, and that all chattels, and also the right of *J. J. Allen* and *Midwood* to recover and receive all debts and things in action, subject to the trusts of the will, should forthwith vest in *J. J. Allen* and *C. J. Allen*, as trustees of the will and as joint tenants, for the purposes and upon the trusts thereof. And *C. J. Allen* thereby consented to be a trustee of the will.

This summons was taken out by *J. J. Allen* and *C. J. Allen* asking that the appointment of *C. J. Allen* as a trustee of the will might be approved by the Court, and that he might be added as a co-Plaintiff with *J. J. Allen* in the place of *Midwood*, he submitting to account.

Everitt, Q.C., and *E. Brodie Cooper*, for the summons.

W. W. Karslake, Q.C., and *E. S. Ford*, for the Defendant *Boyd*:—

The appointment of *C. J. Allen* is bad, because *Midwood*, the retiring trustee, did not join in it. Under a power of appointment framed as this is the retiring trustee ought to join with the continuing trustee in making the appointment: *In re Glenny and Hartley* (1). In that case Vice-Chancellor *Bacon* disapproved of the decision of Vice-Chancellor *Kindersley* in *Travis* v. *Illingworth* (2).

[PEARSON, J., referred to *Nicholson* v. *Wright* (3); *Pell* v. *De Winton* (4), and *Stones* v. *Rowton* (5).]

At any rate, as, by reason of the administration action, the sanction of the Court to the appointment is necessary to give it validity, the Court will not sanction the appointment of a trustee who is the solicitor of the continuing trustee, and is also his son and his partner in business. The *cestuis que trust* are entitled to have two independent trustees: *Wheelwright* v. *Walker* (6); *In re Orde* (7); *In re Kemp's Settled Estates* (8).

Everitt, in reply:—

[PEARSON, J.:—You need not trouble yourself about the first objection.]

(1) 25 Ch. D. 611.

(2) 2 Dr. & Sm. 344.

(3) 5 W. R. 431

(4) 2 De G. & J. 13.

(5) 17 Beav. 308.

(6) 23 Ch. D. 752.

(7) 24 Ch. D. 271.

(8) Ibid. 485.

The administration judgment does not put an end to the power of appointment; it only renders the approval of an appointment by the Court necessary: *In re Gadd* (1). It may be contrary to the practice of the Court to appoint the solicitor of the parties a trustee, but such an appointment is not invalid, and the Court will not disapprove it when it has been made. The property will have to be sold, and it will be sold under the direction of the Court. No injury can, therefore, result from the appointment. The interests of the *cestuis que trust* will be fully protected by the Court.

PEARSON, J.:—

The objection which is taken to the appointment of Mr. *C. J. Allen* resolves itself into two. The first is, that the deed of appointment makes Mr. *J. J. Allen* alone the appointor of the new trustee; Mr. *Midwood* is made a party to the deed, but he does not join in the appointment, and it is said that the appointment is therefore bad. In the next place, it is said that, Mr. *C. J. Allen* being a partner with his father and, therefore, one of the solicitors of the trustee and of some of the beneficiaries, his appointment is contrary to the practice of the Court, and that, upon that ground, the Court ought not to sanction it. It is not argued, nor could it be after the decision of the Court of Appeal in *In re Gadd* (1), that the power to appoint does not remain in Mr. *J. J. Allen*, but it is said that the appointment can only be made subject to the sanction of the Court, and that is not disputed. No personal objection has been taken, nor, so far as I know, could any such objection properly be taken, to Mr. *C. J. Allen* as a trustee, and if he had been an independent person no objection would have been raised to his appointment, and it must be distinctly understood that I take no objection to him personally. I have only to consider what I ought to do, acting according to the usual practice of the Court, and having regard to the particular circumstances of the case.

Now there has been a considerable controversy between the parties with reference to the sale of the testator's property, and *primâ facie* the trustees have the power of sale, and would,

(1) 23 Ch. D. 134.

according to the ordinary rule of the Court, have the conduct of the sale. No doubt it is quite within the power of the Court in its discretion to take the conduct of the sale from the trustees and to give it to some other person; but, if there be nothing to induce the Court to alter the ordinary practice, the trustees would have the conduct of the sale.

I proceed to consider the two objections. The first question is whether Mr. *C. J. Allen* has been properly appointed by Mr. *J. J. Allen* only, Mr. *Midwood* being accessible and being capable, therefore, of joining in the appointment.

Mr. *Karslake* has very properly pressed upon me the recent decision of Vice-Chancellor *Bacon* in *In re Glenny and Hartley* (1), and I have so much respect for the Vice-Chancellor's experience and knowledge in these matters, that, if that were the only decision on the point, I should hesitate long before I expressed an opinion contrary to his, and even now, when I propose to express an opinion adverse to the doctrine which counsel have extracted from his judgment, I desire to say most distinctly, that, looking at the terms of the power in that case, I am very far from suggesting or even hinting that the Vice-Chancellor's judgment was not perfectly right, and in conformity with the terms of that particular power. But, when I am asked to deduce from his judgment the general conclusion that, when the power of appointment of new trustees is in the ordinary form, it is necessary for the retiring trustee to join with the continuing trustee in appointing a new trustee in his place, I must express my dissent as strongly as I can from that conclusion, and I am very glad to find that the opinion which I entertain, and which I have entertained for a great many years, and as to which I confess I should have had no doubt whatever but for the manner in which counsel has pressed upon me the decision of Vice-Chancellor *Bacon*, is in accordance with the doctrine enunciated by Vice-Chancellor *Kindersley* in *Travis* v. *Illingworth* (2), as it is, I think, in accordance with what had been for many years previous to that decision the recognised opinion of all the profession.

Now, in *In re Glenny and Hartley* the terms of the power were

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(1) 25 Ch. D. 611.

(2) 2 Dr. & Sm. 344.

PEARSON, J.

1884

In re NORRIS.

ALLEN *v.* NORRIS.

somewhat peculiar, and I think it was the peculiarity of those terms which led the Vice-Chancellor to the conclusion to which he came. In that case there were two trustees, and they both desired to retire, and thereupon they appointed new trustees in their place. It was objected on the part of a subsequent purchaser of the property that the appointment was bad. The Vice-Chancellor held that it was good. No doubt he said that he differed from Vice-Chancellor *Kindersley's* decision in *Travis* v. *Illingworth* (1). But the power in *In re Glenny and Hartley* (2) (stating it shortly, was this): "It shall be lawful for the surviving or continuing trustees or trustee of these presents, or the heirs, executors, or administrators of the last surviving trustee, by any deed or deeds, in the event of any trustees or trustee dying, or going to reside beyond the seas, or declining or becoming incapable to act, to discharge such trustees or trustee from the trusts hereby declared, and all obligation and responsibility in respect thereof, and to appoint any new trustees or trustee." Had it stopped there it would have been very nearly in the ordinary form used in settlements. But then followed these words: "Provided, nevertheless, that nothing herein contained shall authorize the discharge of the only continuing trustees or trustee for the time being, without the substitution of another trustee or trustees, so that there may be at least one trustee to carry on the trusts of these presents." That clause does seem to me to indicate that it was intended that, if there was only one trustee, and he desired to retire, he might appoint another trustee in his place and retire accordingly. And, if that be the proper construction, I can see no reason why, if there were two trustees, and they desired to retire, they might not do that which one retiring trustee might have done. Under those circumstances I think that Vice-Chancellor *Bacon* had very strong reason indeed for coming to the conclusion that the appointment was good.

But that to my mind does not touch the case of the ordinary power. Although Mr. *Karslake* says that the last proviso in that case puts nothing into the power which would not have existed in it without, I venture to differ from him, for I think it shews that an appointment might be made by an only trustee who was

(1) 2 Dr. & Sm. 344.

(2) 25 Ch. D. 611.

desirous of retiring. That decision, therefore, leaves the ordinary rule of the Court which was acted upon in *Travis* v. *Illingworth* (1) undisturbed.

Is it then the case that, where there are two trustees, and one of them wishes to retire, the continuing trustee (by which I mean the trustee who intends to continue to be a trustee of the instrument) cannot appoint by himself, but must have the concurrence of the trustee who is actually retiring? With all respect to the judgment of Vice-Chancellor *Bacon* I cannot think that the words "continuing trustee" in the ordinary form mean a trustee who is desirous of retiring and intending to retire *instanter*, because, as I recollect it, it used to go on to say "thereupon the trust premises shall be conveyed so that they may vest in the new trustee and the continuing trustee." That shews that the "continuing trustee," in whom the trust premises are to vest jointly with the new trustee, cannot be the trustee who is then about to retire, but that the words "continuing trustee" mean, not the retiring trustee, but the trustee who intends to remain a trustee of the instrument. This further consideration may, I think, be indirectly relied upon, viz. the great inconvenience which would result from any other conclusion. In many cases, indeed, according to my experience, in almost all the cases provided for by these clauses, one of the contingencies provided for is "if a trustee shall leave this country." Now if you are to say that the continuing trustee who remains in this country cannot appoint a new trustee in the place of one who has gone abroad, and who may possibly not be accessible, whose whereabouts may not be known, you would at once be placing a difficulty in the way of the exercise of the power of appointment which would in many cases be fatal. So it would be if the trustee became incompetent from mental disease. He might not then be able to exercise the power, and these clauses would not fulfil the function for which they are inserted in the instrument. I think I may say that in the majority of cases it would be found impossible to exercise the power, if it was construed in that way. For these reasons I adhere to the opinion expressed by Vice-Chancellor *Kindersley* in *Travis* v. *Illingworth*.

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(1) 2 Dr. & Sm. 344.

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In re NORRIS. ALLEN *v.* NORRIS.

I think that the proper person to appoint is the trustee who intends to remain a trustee, and that, consequently, as regards form, the appointment of Mr. *C. J. Allen* by Mr. *J. J. Allen* alone was a valid appointment.

The other question remains whether I ought to sanction the appointment, and I am of opinion that I ought not.

It is admitted that, according to the ordinary practice, the Court would not appoint as trustee the solicitor of the existing trustee, and I think that the Court would certainly not appoint as a co-trustee with that solicitor his partner, whether he was his son or some other person. The Court does not look at the competency of the particular person; it looks at the position which he fills, and, according to the ordinary rule of the Court, the solicitor of a trustee is not a person who should be appointed a trustee. I think it is of the greatest importance that the Court should adhere to the general rule, and for this, if for no other, reason, that it prevents the necessity of considering in any particular case whether the solicitor is or is not a person of respectability and trustworthy. The Court always declines to go into any question of that kind, and says, assuming that you are the very person who would be most fit to be a trustee, we object to you simply on the ground of the position which you hold. Then Mr. *Everitt* says that in this case the trustees are appointed for the purpose of the sale of this property, they are going to conduct the sale under the order of the Court, or, at any rate, the conduct of the sale will to a great extent be subject to the sanction of the Court and carried on with the knowledge of all the parties, and there is no reason therefore in this particular case, whatever may be the general rule, why these two solicitors should not be the trustees. I differ from Mr. *Everitt* there; I think that, whether the sale is to be conducted under the direction of the Court or outside the Court, the *cestuis que trust* are entitled to the assistance of two independent persons as trustees to aid them in conducting the sale in the best manner. They have a right to ask that they shall have the aid of two minds, and not, as they would have in this case, where the father and son are in partnership, the aid practically of one mind only. It is plain that, the father and son being in partnership, there would be practically only one person acting as trustee and not two.

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For these reasons I am of opinion that I cannot sanction this appointment, and I must refer the matter to Chambers that a new trustee may be appointed. Mr. *J. J. Allen* will still have power, as he had before, to nominate a fit and proper person, but that person cannot, for the reasons which I have given, be his partner.

I am very far from saying, and I must not be understood to say, that, if there was a trust which was not being administered by the Court, and the person who had the power of appointing new trustees had *bonâ fide* appointed as trustees a father and his son who were solicitors in partnership, it would be a bad appointment, so as to render any deed executed by the trustees so appointed null and void. I should be very sorry to hold that such an appointment outside the Court would be invalid. If such a case came before me, and I found that the appointment had been made *bonâ fide* outside the Court, I should certainly hold that the trustees were validly appointed.

Solicitors for Applicants: *J. J. & C. J. Allen.*

Solicitors for *Boyd*: *Chester, Mayhew, & Co.*, agents for *Norris & Sons, Liverpool.*

W. L. C.

STANDING *v.* BOWRING.

[1883 S. 566.]

PEARSON, J.
1884
June 26; *July* 1.

Transfer of Stock into joint Names—Trust—Intention to benefit—Claim to have Re-transfer.

The Plaintiff, a widow, in the year 1880 caused a sum of £6000 Consols to be transferred into the joint names of herself and the Defendant, who was her godson, and in whose welfare she took great interest. This transfer was not made known to the Defendant. In 1882 the Plaintiff, then eighty-eight years old, married a second husband, and soon afterwards applied to the Defendant to re-transfer the stock into her name alone:—

Held, upon the evidence, that the transfer was originally made with the deliberate intention of benefiting the Defendant, and not with a view to the creation of a trust. The Court could not, therefore, compel the Defendant to re-transfer the stock.

ON the 3rd of November, 1880, the Plaintiff, *Mary Alner Standing*, caused a sum of £6000 Consols, which was standing in her then name of *Mary Alner Bowring*, to be transferred into the joint names of herself and the Defendant *Robert Alner Bowring*. The Plaintiff did not inform the Defendant of what she had done, and continued to receive the dividends as they became due, and she claimed to be absolutely entitled to the fund for her separate use. In December, 1882, the Plaintiff, being then a widow of the age of eighty-eight, married the other Defendant, *Stephen Standing*, and shortly after the marriage the Plaintiff's solicitors wrote to the Defendant informing him that the said sum of Consols was standing in his name jointly with that of the Plaintiff, and requiring him to re-transfer it into the name of the Plaintiff.

The Defendant, after some correspondence upon the subject, declined to execute the re-transfer, and the Plaintiff then brought this action, alleging that she had no intention at the time she transferred the £6000 into their joint names to confer any beneficial interest in the fund upon the Defendant, and she now claimed that she was absolutely entitled to the fund for her separate use, and that the Defendant was a trustee thereof for her, and that he might be ordered to concur in transferring the same to the Plaintiff, or as she should direct, and that he might be ordered to pay the costs of the action.

The defence was that the Defendant was a godson of the Plaintiff and a relative of hers, and was also a godson and a relative of her first husband, *Robert G. S. Bowring*; that the Plaintiff had expressed her desire and intention of making the transfer for the purpose of benefiting him, and of securing the said sum of Consols to him in the event of his surviving her. That since the transfer was made the Plaintiff had repeatedly stated it was for the purpose of benefiting the Defendant. It appeared that the Plaintiff never informed the Defendant of the transfer but expressed to other persons, especially to her stockbroker, Mr. *Dalton*, her intention of benefiting the Defendant while reserving the life income to herself. The Defendant admitted that the Plaintiff was entitled to receive the dividends on the Consols during her life, but denied that the Plaintiff was absolutely entitled to the fund for her separate use, or that she was entitled to a transfer thereof into her own name, and he denied that he was a trustee of the fund for the Plaintiff.

The Defendant claimed that by virtue of the transfer and the declarations made both before and after the transfer, he was entitled, in the event of his surviving the Plaintiff, to the whole legal and beneficial interest in the £6000, and the dividends to accrue thereon, from and after the decease of the Plaintiff.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the Plaintiff:—

The principal facts in this case are that the Defendant, *Robert Bowring*, was not made acquainted by the Plaintiff with the fact that she had transferred this sum of £6000, which was standing in her own name, into the joint names of herself and the Defendant, and further that the Defendant was no relation to the Plaintiff. She acknowledged no connection except being his godmother, that is, both she and her first husband acted as sponsors at his baptism. Of course if money is transferred into the name of a person who is a child, or who stands in the position of a child, to the person who makes the transfer, the law presumes an intention to benefit, unless there is proof of a contrary intention. That was laid down in *Bennet* v. *Bennet* (1).

But this rule does not apply to the case of a stranger, such as the Defendant was. Therefore, *primâ facie*, this money still belongs to the Plaintiff, and the presumption is that the Defendant is a trustee for the Plaintiff, and the onus is upon the Defendant to prove the contrary. That has been settled by *Fowkes* v. *Pascoe* (2). But the Defendant admits that the Plaintiff is entitled to the dividends for her life, that is, that he is a trustee for her during her life, which is a trust quite inconsistent with what may be called the legal title, and it does not carry into effect what the Defendant alleges to be the intention of the settlor. This is a voluntary settlement according to the Defendant, which cannot, however, be rectified, because there was no antecedent contract to give effect to. If a voluntary settlement does not effect the intention, and there is no contract to shew what the intention was, then the Court will set it aside absolutely.

First, then, we deny any intention on the part of the Plaintiff to benefit the Defendant, and it is for him to prove it; and next we say that even if he established that, still according to the

(1) 10 Ch. D. 474.

(2) Law Rep. 10 Ch. 343.

form of the instrument it was not one which would effect the object admitted by the Defendant, that of giving the dividends to the Plaintiff for life, and the settlement cannot be rectified, but must be set aside altogether.

Giffard, Q.C., and *Dunning*, for the Defendant:—

We have evidence to shew that long before the transfer, and subsequently, she expressed her intention of making it for the benefit of the Defendant, who now contends that he is entitled to keep it for his benefit if he should survive the Plaintiff.

We do not rely upon the doctrine of a person standing *in loco parentis* to the person intended to be benefited; but we do rely upon the intimate relation of sponsor and godson, and also the relation by blood, as shewing the antecedent probability of benefit being intended instead of a transfer with a resulting trust for which no possible motive could be suggested, whereas we say there was an intention perfectly consistent with what might have been expected. And as to rectifying the settlement, we maintain that the transfer was exactly in the form it should have been to give the benefit to the Plaintiff for life, and then to her godson if he survived her. There was in fact a gift intended, and a gift made, and it is too late now to alter it.

Murphy, Q.C., for the present husband of the Plaintiff.

PEARSON, J., after referring to the correspondence and the evidence, said:—

It is quite clear that when Mrs. *Standing* transferred this sum of £6000 Consols into the names of herself and Mr. *Bowring* she had well considered what she was doing. This course was not adopted by her without full consideration, and it was not till after some months from the time when she first mentioned the subject to her stockbroker that she eventually decided upon placing the money in the joint names. This money had formerly belonged to her first husband, and he had transferred it into the names of himself and his wife, so that it became the property of his widow by survivorship. The Defendant, Mr. *Bowring*, was, it appears, the godson of Mrs. *Standing* and of her first husband, and it is evident that they both of them took great interest in him, and I have no doubt from the evidence that when she made this transfer in 1880 she intended it should enure to the benefit of the Defendant if he should survive her, and that she intended to reserve the dividend upon the fund during her life. After the transfer, however, the Defendant entered into a business partnership with a Welshman, and this she disapproved of, and she wrote to her stockbroker, Mr. *Dalton*, telling him that in consequence of this partnership she had determined "to revoke his name out of the *Bank of England* on the £6000," as she considered him an undeserving man, and she had made up her mind to give away the money by her will. She therefore requested Mr. *Dalton* to do away with her intended gift to Mr. *Bowring*, which could not be done without *Bowring's* concurrence. If this had been the case of a simple transfer of stock into the names of the Plaintiff and another person it might have been difficult to say that it was not a trust for the Plaintiff, but upon the whole of the evidence in this case it is impossible for this Court to interfere with what the Plaintiff has deliberately done, and to compel the Defendant to retransfer the stock to the Plaintiff absolutely. The action must therefore be dismissed with costs.

Solicitors: *Sandom, Kersey, & Knight; Bell, Brodrick, & Gray.*

T. W. G.

PEARSON, J.

1884

July 7.

In re ROBERTS.
TARLETON *v.* BRUTON.

[1881 R. 2719.]

Will—Construction—Lapse—Intestacy—Bequest of Share of Residue to a Woman —Direction for Settlement of Share—Death of Legatee in Testator's Lifetime.

A testator bequeathed the residue of his personal estate to trustees, upon trust for a nephew and three nieces by name, equally between them. And he declared that his trustees should retain the share of each of his nieces, upon trust to pay the income to her during her life, for her separate use without power of anticipation, and after her decease, as to the capital thereof, upon trust as she should by will appoint, and in default of appointment, upon trust for her child or children, sons at twenty-one and daughters at twenty-one or marriage, equally between them if more than one. One of the nieces married, and died before the testator, leaving an infant daughter her surviving :—

Held, that the share of the deceased niece had lapsed, and that there was an intestacy in respect of it.

Stewart v. *Jones* (1) followed.

Unsworth v. *Speakman* (2) disapproved.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate, and the execution of the trusts of the will, of *Christopher Roberts*, who died on the 11th of February, 1880. By his will, dated the 25th of August, 1869, the testator bequeathed the residue of his personal estate to trustees, upon trust for sale and conversion, and investment of the proceeds of sale and conversion, and to stand possessed thereof upon trust for his nephew and nieces, *Edward Thomas Lucas Roberts*, *Harriet Mary Blanche Roberts*, *Josephine Grigg*, the wife of *Edward Grigg*, and *Clara Susannah Roberts*, equally between them share and share alike. And he declared that his trustees or trustee should retain the share of each of his nieces of and in the said trust funds upon the trusts following, (that is to say), upon trust to pay the income thereof to her during her life, for her separate use without power of anticipation, and after her decease, as to the capital thereof, upon trust for such person or persons and in such manner as she by

(1) 3 De G. & J. 532.

(2) 4 Ch. D. 620.

her will should appoint, and, in default of such appointment, and so far as any such, if incomplete, should not extend, upon trust for her child or children, who being male should attain the age of twenty-one years, or being female should attain that age or marry, equally between them if more than one. The nephew, *Edward Roberts*, and the nieces, *Josephine Grigg* and *Clara Roberts* (the plaintiff in the action) survived the testator. *Clara Roberts* married *Frank Tarleton*. The niece *Harriet Roberts* married *J. H. Tarleton*, and died on the 9th of January, 1876, in the lifetime of the testator. She left two infant children her surviving, viz., *Rosetta Clara Tarleton*, who was born on the 2nd of November, 1874, and *Gertrude Tarleton*, who was born on the 3rd of December, 1875, and died on the 29th of January, 1876.

On the 24th of March, 1882, an administration judgment was pronounced. The Chief Clerk made his certificate on the 9th of April, 1884, and the action now came on for further consideration. One of the questions for determination was whether the gift of a share of the residue to the testator's niece *Harriet* had lapsed, or whether her infant daughter *Rosetta Clara Tarleton* was entitled to it, contingently on her attaining twenty-one or marrying under that age. The mother had made no appointment by will.

Cookson, Q.C., and *Speed*, for the infant daughter:—

The effect of the will as a whole is that the nieces' shares are settled upon them and their children, and there is no lapse by reason of a niece dying in the lifetime of the testator, if she has left a child: *Unsworth* v. *Speakman* (1).

Cozens-Hardy, Q.C., and *L. Ryland*, for Mrs. *Grigg* and her children:—

Unsworth v. *Speakman* is inconsistent with the decision of Lord *Chelmsford*, L.C. in *Stewart* v. *Jones* (2), which affirmed a decision of Vice-Chancellor *Wood*.

Warmington, Q.C., and *Charles Browne*, for the nephew.

W. W. Karslake, Q.C., and *W. Phipson Beale*, for the trustees.

(1) 4 Ch. D. 620.

(2) 3 De G. & J. 532.

Cookson, in reply:—

The testator speaks of "the share" of each of his nieces only by way of description; he means the share which he has allotted to each niece and her children. He cannot have intended to make the interests of the children of a niece contingent on the accident of their mother surviving himself. In *Stewart* v. *Jones* (1) the words were "the share to which each of my daughters on her attaining twenty-one shall become entitled under the trusts aforesaid."

PEARSON, J.:—

I am very sorry that I am unable to decide against Mr. *Cozens-Hardy's* contention; it would give me much greater satisfaction if I could affirm Mr. *Cookson's* proposition. [His Lordship read the provisions of the will and stated the other facts, and continued:—] The question is whether the child of the dead niece takes any interest under the will? Now that which the testator directed to be settled was "the share" of each of his nieces. This niece died before him, and she could not, therefore, take any share under his will. Consequently, in her case there was no share to settle, and her child can take nothing under the will. This is really the effect of the decision in *Stewart* v. *Jones*, in which Lord *Chelmsford* said (2): "Then follows the proviso as to daughters' shares, which appears to me merely to settle the shares of daughters who would take under the preceding gift. For what does the testator dispose of in this proviso? Why the shares to which his daughters shall become entitled 'under the trusts aforesaid.' Mr. *Bevir* said that we are not to look to the gift alone, but to the subsequent part of the will also. I quite agree with him. The terms in which the daughters' shares are settled must be regarded, but they must be applied to a share in existence."

In opposition to this decision *Unsworth* v. *Speakman* (3) is cited, in which Vice-Chancellor *Malins* refused to follow *Stewart* v. *Jones*. I do not feel myself able to disregard the authority of the Court of Appeal, and it would be utterly impossible for me to accede to the canons of construction laid down by the Vice-Chancellor. I hold, therefore, that the share of the deceased niece has lapsed, and that there is an intestacy in respect of it.

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(1) 3 De G. & J. 532.
(2) 3 De G. & J. 535.
(3) 4 Ch. D. 620.

PEARSON, J.
1884
In re ROBERTS.
TARLETON *v.* BRUTON.

Solicitors: *Tucker & Lake; Spencer Whitehead*, agent for *Brittans, Livett, & Miller, Bristol; Irwin & Nash.*

W. L. C.

In re KNATCHBULL'S SETTLED ESTATE.

[1884 K. 518.]

PEARSON, J.
1884
July 17.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 25, 26—*Payment of prior Incumbrances—Land Drainage Charges.*

Where a tenant for life of settled land has, prior to the *Settled Land Act*, 1882, created charges for land drainage and improvements under the *Land Improvement Act*, 1864, and other Acts, he will not be entitled under the *Settled Land Act* to have those charges paid out of the capital of the settled land.

The 26th section of the *Settled Land Act*, 1882, is prospective, not retrospective.

The term "incumbrances affecting the inheritance of the settled land" in sect. 21, sub-sect. 2, must be taken as meaning incumbrances in the ordinary sense, such as mortgages, portions, &c., and not terminable charges such as those which affect the tenant for life, rather than the remainderman.

THIS was an adjourned summons upon an application on the part of Sir *Wyndham Knatchbull*, the tenant for life under a settlement dated the 12th and 13th of March, 1841, that it might be declared that *W. Honywood* and *Benjamin Lake*, the present trustees of the settlement, may be directed out of the capital money now in their hands or out of the proceeds of sale of lands, subject to the said settlement and about to be sold under the powers of the *Settled Land Act*, to pay off and discharge certain incumbrances affecting the inheritance of the settled lands, namely, certain land-drainage improvement charges; and that the costs be paid out of the property subject to the settlement.

The settled estates were of the annual value of about £10,000, and the trustees held investments of about £10,000 in value.

The estates were subject to certain land-drainage charges created under the *General Land Drainage and Improvement Act*, 1849, the *Limited Owners' Residences Act*, 1870, and *Improvement of Land Act*, 1874. These charges which had been effected between the 31st of August, 1867, and the 6th of April, 1882, amounted to the annual sum of £1216 11*s.* 5*d.*, and the capital required to redeem those charges would amount to £16,038 13*s.* 11*d.* The offices to which the charges were assigned, had agreed to accept payment off for the amount above stated.

Cozens-Hardy, Q.C., and *H. Lake*, in support of the summons:—

By sect. 21 of the *Settled Land Act*, 1882, capital money arising under that Act (which by sect. 33 includes money in the hands of the trustees and liable to be laid out in the purchase of land to be made subject to the settlement) may be applied (sub-sect. 2) in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled estates, or (sub-sect. 3) in payment for any improvement authorized by the Act. The charges in question were effected for drainage and other purposes, which are among the improvements authorized by sect. 25 for the benefit of the settled land, and improvements such as these are evidently therefore within the scope of the Act, and there seems to be no doubt that money in the trustees' hands can be expended in carrying out improvements of this nature. The only question is therefore whether existing charges for similar purposes can be paid off out of moneys in their hands.

The works in respect of which these charges were created were executed precisely in the manner in which such works are by the Act directed to be carried out, namely on a certificate of the Commissioners as specified in sect. 26, sub-sect. 2, and no objection can be raised on the ground that the work has not been properly carried out.

Mr. *Wolstenholme*, in his note on sect. 21, says that sect. 53 is alone sufficient to prevent a tenant for life paying off a charge of this kind out of capital, but if so, it would also prevent the application of money for a fresh charge of the same nature though this is expressly authorized by the Act. The annual payments made by Sir *W. Knatchbull* in respect of capital alone amount to over £1200. He is now about to sell part of the settled estates, and if the property is sold subject to these charges intending purchasers will deduct the annual payment as if it were a permanent annual outgoing, and so greatly reduce the apparent capital value—a result which will prejudice the remaindermen equally with Sir *W. Knatchbull.*

Cookson, Q.C., and *Church*, for the trustees:—

The trustees desire to act under the authority of the Court, and are quite willing that these charges should be paid out of capital if the Court is of opinion that they may do so; but we submit that terminable charges are not properly payable out of capital, and that although the works in respect of which the drainage charges were created might, if now executed, be paid for out of capital, they have no power to pay drainage charges actually created in respect of works executed prior to the passing of the *Settled Land Act*, 1882.

PEARSON, J.:—

I am very much afraid I cannot make the order I am asked to make on this summons. It seems to me to be a *casus omissus* of the Act altogether; and, if that be so, as I have merely a statutory jurisdiction under this Act I cannot exceed it. The case is this: Sir *Wyndham Knatchbull*, being tenant for life of large estates, under the Act of 27 & 28 Vict. borrowed money from the Improvement Commissioners, some £16,000—more I suppose originally—in order to effect drainage improvements upon the estate. Everybody admits that those drainage improvements were properly done: everything connected with those drainage improvements was carried through in conformity with the Act then in force—the Act of 1864. Under that Act the scheme was this: The moneys so borrowed from the Improvement Commissioners for the purpose of drainage improvements were to be repaid to them with interest in a certain series of years, so that if there was one tenant for life or successive tenants for life, the tenant for life or the tenants for life each in their turn paid their proportion of those improvements, the first tenant for life getting the first benefit of the Act, and whilst the improvements were new paying the larger sum. The tenants for life in remainder paying smaller sums as the payments became reduced in consequence of a portion of the capital being paid off from year to year. I understand the sum annually paid at the present moment by Sir *Wyndham Knatchbull* in order to repay the capital and to pay the interest, is no less than £1200 a year, and the sum which would be necessary, in order to redeem this charge upon the estate, would be £16,000.

Sir *Wyndham Knatchbull* is desirous as tenant for life of selling a certain portion of the settled estates; and he says, and very reasonably, "I am desirous of paying off this charge upon the settled estates, because if I sell the estates subject to the charge, the purchaser no doubt will value them as if they were perpetual charges and deduct therefore from the purchase-money which he is willing to give, an unfair proportion in respect of it." I think it is very likely it would be so. The conclusion at which I might possibly arrive is that which I have thrown out in argument, that if that be so the question may arise as to whether when there is a charge of this kind (a very peculiar thing, created by the Act of 1864) having regard to sect. 63 of the Act this is a case in which the tenant for life can properly sell. On that I give no opinion. I cannot help saying that, having regard to the peculiar phraseology of that section, upon which no construction has yet been placed by any competent authority, a question of that kind may arise, but whenever the question does arise I hope the Court before whom it comes will then be able to find some satisfactory mode of determining it.

The argument in favour of the tenant for life as regards the payment off at the present moment of this charge upon the inheritance turns very shortly upon one or two sections of the *Settled Land Act*. By sect. 21, sub-sect. 2, capital money is authorized to be employed "in discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit-rent, charged on or payable out of the settled land." It is quite plain that this charge does not come within any of those payments subsequently mentioned in that section. But it is said that this is an incumbrance affecting the inheritance of the settled land, and that, inasmuch as the words are general, this authorizes the payment off of these incumbrances. But in answer to that it occurs to me that the balance is greatly in favour of saying that it does not come within those words. I think the words "incumbrances affecting the inheritance of the settled land," must be taken to have been used in their ordinary sense such as mortgages, portions, &c., and not as meaning incumbrances with incidents such as these are which require the tenant for life, if he lives sufficiently long himself to pay off the whole of this charge; and, although in one sense this is an incumbrance affecting the inheritance so far as the Commissioners advance their money on a charge upon the inheritance, it is in very numerous cases a charge which to all intents and purposes rather affects the tenant for life than the tenant in remainder. It is plain that it is so in a great many cases, and notably in the case before me, where I am told the tenant for life is only forty years of age, and there are only fifteen years more to run during which this charge will be paid; it is therefore a charge, an incumbrance which affects the estates of the tenant for life rather than the estates of the tenant in remainder. No one would contend that under these words a jointure or rent-charge could be bought up. No one could contend that the trustees would be entitled to invest any part of the capital money in relieving the estate of such a charge as that; and when you come to look at the incumbrances which are specifically mentioned, and which in ordinary language would not be held to be included in "incumbrances," all those are perpetual, and I think that points the same way and seems to shew that the word "incumbrances" here is not used to apply to a specific incumbrance of this kind with incidents which affect the tenant for life far more than they affect those in remainder, and that I should not be justified, therefore, in deciding that this should be paid off under those general words in the preceding part of this section.

Then it is argued with very great force that under the 25th and 26th sections of the Act, if the tenant for life had not made the drainage improvements and were to come to the Court now and ask the Court to sanction those improvements being made

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1884
In re KNATCHBULL'S SETTLED ESTATE.

out of capital money, he would be entitled to have them so paid, and it is said therefore, that being the case, I ought to consider that the Act would have in this respect a retrospective action, and that, inasmuch as this might be done now, I ought to consider it as if it were done now, and to order the balance that is due with respect to these improvements to be paid out of capital moneys. In the first place, I must say, as Mr. *Cookson* very properly pointed out, that the language of the 26th section is entirely prospective and not retrospective, and I should have great difficulty in that respect in applying that section to the present application; but, in the next place, I cannot help thinking that when this Act bestows on the tenant for life the powers given him under this section in a case in which he is tenant for life subject to such a special charge affecting his life interest, that it was not the intention of this Act, giving the tenant for life all the powers that it does, to relieve him personally from liabilities which he had taken upon himself; and in that view I cannot hold that this section of the Act is retrospective, and I must decide therefore against this application. The costs as between solicitor and client may be paid by the trustees out of the estate.

Solicitors: *Lake, Beaumont & Lake*; *H. J. Bell.*

T. W. G.

PEARSON, J.
1884
July 25.

CRICK *v.* HEWLETT.

[1883 C. 2290.]

Practice—Motion to dismiss for want of Prosecution—Notice of Trial given, but Trial not entered—Rules of Supreme Court, 1883, *Order* XXXVI., *rr*. 12, 16.

A Plaintiff gave notice of trial (in *Middlesex*) within the six weeks limited by rule 12 of Order XXXVI.; but did not, as required by rule 16, enter the trial within six days after the notice of trial was given. The trial not having been entered:—

Held, that the Defendant was entitled to move to dismiss for want of prosecution, and an order dismissing the action was accordingly made.

THIS action was commenced on the 30th of May, 1883. On the 9th of February, 1884, the Plaintiff delivered a statement of claim. On the 22nd of February, 1884, the Defendant delivered a statement of defence and counterclaim. On the 13th of March, 1884, the Plaintiff delivered a reply and a defence to the counterclaim, and on the 20th of March, 1884, the Defendant delivered a rejoinder. On the 1st of May, 1884, the Plaintiff served the Defendant with notice of trial of the action before a Judge in *Middlesex*, for the 12th of May, 1884. The Plaintiff did not, as required by rule 16 of Order XXXVI., enter the trial. On the 20th of June, 1884, the Defendant's solicitor wrote to the Plaintiff's solicitors, "It is the Defendant's intention to move to dismiss this action, unless the same is entered for trial on or before the 23rd instant." The entry was not made, and on the 12th of July the Defendant served the Plaintiff with a notice of motion that the action might be dismissed for want of prosecution.

E. Ford, for the Defendant:—

The Defendant is entitled to have the action dismissed for want of prosecution, under rules 12 and 16 of Order XXXVI. (1). The notice of trial being, by virtue of rule 16, no longer in force, the effect is the same as if no notice had ever been given. "Notice of trial" in rule 12 means an effective notice, and, the trial not having been entered, the notice of trial has become inoperative. It is true that the Defendant might himself have entered the trial, but he was not bound to incur that expense. He is entitled to adopt the alternative course of moving to dismiss for want of prosecution.

The Plaintiff did not appear.

(1) Rule 12: "If the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just."

Rule 16: "In *London* and *Middlesex*, unless within six days after notice of trial is given, the trial shall be entered by one party or the other, the notice of trial shall be no longer in force."

PEARSON, J. PEARSON, J.:—

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I will make the order. The Plaintiff will be able to move to discharge it if he chooses.

Solicitor: *W. Foster.*

W. L. C.

PEARSON, J.

1884

July 25.

LUMB *v.* BEAUMONT.

[1883 L. 143.]

Practice—Inspection of Property—Interlocutory Order—Authority to dig up Soil—Rules of Supreme Court, 1883, *Order* L., *r.* 3.

Under rule 3 of Order L. the Court has power to make an interlocutory order before trial giving liberty to a plaintiff to enter upon land belonging to the defendant, and to excavate the soil thereof for the purposes of inspection.

The decision in *Ennor* v. *Barwell* (1) has no application to this rule.

MOTION.

By his statement of claim the Plaintiff alleged, *inter alia*, that he was the owner of five cottages in *Providence Street, Elland,* in the county of *York,* and also of a private drain in *Providence Street,* and that the Defendants had wrongfully connected certain premises, known as *Parsonage House,* belonging to them, in *Providence Street,* with the Plaintiff's drain, and had wrongfully caused and were wrongfully causing sewage to be discharged and pass from their premises into the Plaintiff's drain. And the Plaintiff claimed an injunction to restrain the Defendants from causing or permitting any sewage to be discharged or pass from their premises into the Plaintiff's drain, and from continuing or permitting to remain any communication between their premises and the Plaintiff's drain.

By their statement of defence the Defendants said that the drain referred to in the statement of claim was a new drain which the Plaintiff had recently constructed, and that he had connected his new drain with an old main sewer in *Providence Street,* into which the Defendants' premises had previously been drained for more than twenty years before the commencement of the action.

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(1) 1 D. F. & J. 529.

They denied that they had wrongfully, or in fact, connected their premises with, or had caused sewage to be discharged or to pass from their premises into, any drain belonging to the Plaintiff. And they said that the new drain was constructed by the Plaintiff partly on his own land and partly on the Defendants' land, but that all the said sewers and drains were sewers within the meaning of the *Public Health Act*, 1875, and did not belong to the Plaintiff or to the Defendants, who, however, claimed the right to use them, subject to the provisions of that Act and the regulations and control of the *Elland* Local Board. By his reply the Plaintiff joined issue with the Defendants.

This was a summons (brought on by way of motion) by the Plaintiff, asking that he and his servants and workmen might be at liberty to enter upon the Defendants' premises, and to inspect the drain leading from the cellar of the Defendants' house to the Plaintiff's drain in *Providence Street*, and that for such purpose he might be allowed to dig down to that drain and to follow its course from the Defendants' cellar to the Plaintiff's drain. An architect and surveyor employed by the Plaintiff deposed that on the 7th of June he caused a portion of the Plaintiff's property to be opened out, and at a depth of about twelve feet from the surface of the ground he found a pipe connected with the Plaintiff's drain, which pipe ran in the direction of the Defendants' house, but he was not able to trace it throughout its entire length, as it passed through the Defendants' land on which he had no authority to enter. The witness also said that the pipe, which was believed to lead sewage from the Defendants' house to the Plaintiff's drain, passed through that portion of the street which belonged to the Defendants for several feet before it reached the Defendants' house, and to authorize the Plaintiff to open out that part of the street which belonged to the Defendants it was necessary that an order of the Court should be obtained, so that full details as to the pipe and its course might be obtained, in order to establish the fact of its connection with the Defendants' house.

Levett, for the Plaintiff:—

The Court has power to make the order asked for under rule 3 of Order L (1), and a proper case is shewn for so doing. The Plaintiff wishes to pour water down the Defendants' drain in order to see whether it comes into his own drain.

J. Beaumont, for the Defendants:—

Rule 3 does not authorize the order which is asked for, and the Court will not make an interlocutory order authorizing the Plaintiff to dig up the soil of the Defendants' land. That was expressly decided in *Ennor* v. *Barwell* (2), and there is no authority to the contrary. The street cannot be dug up without the consent of the local board.

PEARSON, J.:—

In my opinion *Ennor* v. *Barwell* has no bearing on the construction of the rules under the *Judicature Act*. Rule 3 of Order L. gives a very convenient power of inspection before the trial of an action, in order that the Court may at the trial have before it the materials necessary to enable it to come to a decision.

HIS LORDSHIP made an order to the following effect:—

"Without prejudice to the rights of any other person or authority, the Plaintiff is to be at liberty, on giving forty-eight hours' notice to the Defendants, to enter on that part of the street the soil of which belongs to the Defendants, for the purpose of experimenting, in order to discover whether the pipe which joins the Plaintiff's drain proceeds directly from the Defendants' house, and for that purpose to dig out and excavate the soil of the street so far as may be necessary, the Plaintiff undertaking to do no unnecessary damage, and to replace the street as soon as his investigation is concluded as quickly as possible, and at his own expense."

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(1) Rule 3. "It shall be lawful for the Court or a Judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observations to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

(2) 1 D. F. & J. 529.

Solicitors for Plaintiff: *Bower, Cotton, & Bower*, agents for *Jubb, Booth, & Helliwell, Halifax.*

Solicitors for Defendants: *Van Sandau, Cumming, & Armitage*, agents for *Mills & Bibby, Huddersfield.*

W. L. C.

In re GREENWOOD'S TRUSTS.

PEARSON, J.
1884
July 12, 14, 26.

Appointment of New Trustees—Vesting Order—"Seised jointly"—Coparceners—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), s. 10 [*Revised Ed. Statutes, vol. x., p.* 985].

The words "seised jointly" in sect. 10 of the *Trustee Act*, 1850, are not limited strictly to a legal joint tenancy, but are used in the widest sense, and they include the case of land vested in coparceners, one of whom is out of the jurisdiction of the Court.

In re Templer's Trusts (1) and *McMurray* v. *Spicer* (2) considered.

PETITION.

This was a petition under the *Trustee Act*, 1850, for the appointment of new trustees of a settlement and for a vesting order.

By a deed-poll dated the 25th of March, 1844, *Thomas Greenwood* declared that, in order to make provision for his sister *Eliza Marriage*, the wife of *Joseph Marriage*, and her children, he and his heirs would stand seised of certain copyhold hereditaments, held of the manor of *Chelmsford*, on trust to receive the rents and profits arising therefrom during the life of *Eliza Marriage*, and to pay the same to her for her separate use without power of anticipation, and after her death on trust to sell the said premises and to pay and divide the proceeds of sale among her children living at her death as therein mentioned. *Thomas Greenwood* died on the 12th of December, 1876, having by his will, dated the 29th of October, 1873, devised and bequeathed the residue of his estate real and personal to his son *Herbert Greenwood* absolutely. The will contained no separate devise of trust estates. *Herbert Greenwood* was the testator's heir according to the custom of the manor, and on the 11th of April, 1877, he was admitted tenant to the copyhold premises according to the tenor and effect of the will, and from thenceforth down to the time of his death on the 12th of April, 1880, he acted in the trusts of the deed-poll. He executed a will dated the 17th of April, 1877, but it did not contain any devise of trust estates. His co-heiresses according to the custom of the manor were his two paternal aunts, *Mary Ann Warner*, the wife of *Robert Warner*, and *Eliza Marriage*, and they also on the death of *Herbert Greenwood* became the co-heiresses of *Thomas Greenwood* according to the custom of the manor. *Eliza Marriage* died intestate on the 6th of November, 1882, leaving her son *Oswald Marriage* her heir according to the custom of the manor. He was permanently resident in *Australia*. On the death of *Eliza Marriage*, *Mary Ann Warner* and *Oswald Marriage* became the co-heirs of *Thomas Greenwood* and also of *Herbert Greenwood* according to the custom of the manor.

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(1) 4 N. R. 494.

(2) Law Rep. 5 Eq. 527.

This was a petition by the children of *Eliza Marriage*, other than *Oswald Marriage*, praying for the appointment of new trustees of the deed-poll, and for a vesting order.

One of the Petitioners had taken out administration to the personal estate of *Eliza Marriage*. The petition was not served on any one. The evidence not being complete, the question of the power of the Court to make the order asked for was now discussed.

Carson, for the Petitioners:—

Sect. 10 (1) of the *Trustee Act*, 1850, enables the Court to make the order. In *In re Templer's Trusts* (2) Vice-Chancellor *Stuart* made a vesting order in a similar case. In *McMurray* v. *Spicer* (3) Vice-Chancellor *Malins* appears to have held that coparceners are not "seised jointly," but that each of them is "seised solely" of her share. But the circumstances of that case were very special.

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(1) Sect. 10: "When any person or persons shall be seised or possessed of any lands jointly with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the lands in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate."

(2) 4 N. R. 494.

(3) Law Rep. 5 Eq. 527.

PEARSON, J.
1884
In re GREENWOOD'S TRUSTS.

PEARSON, J.:—

I do not think that the words "seised jointly" in sect. 10 are to be construed strictly as referring only to a joint tenancy at law. I think the words are used in the widest possible sense, and, though coparceners may not be strictly joint tenants at law, I think they are "seised jointly" within the meaning of sect. 10. I have, therefore, power to make the order asked for.

July 26. The petition was now mentioned again on the evidence.

Carson, for the Petitioners, referred to sect. 30 (1) of the *Conveyancing Act*, 1881.

PEARSON, J.:—

I am of opinion that *Robert Warner* and his wife are, within the meaning of sect. 10 of the *Trustee Act*, now seised of the copyholds, either jointly with *Oswald Marriage* as the customary heir of his mother, or jointly with her administrator, upon the subsisting trusts of the deed-poll. In either view I think sect. 10 applies, and I will make the vesting order accordingly. The order will be prefaced with an expression of the opinion of the Court. I will dispense with service of the petition on *Oswald Marriage*.

Solicitors: *Paines, Layton, & Pollock.*

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(1) Sect. 30 provides that "Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, and notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him."

W. L. C.

C. A.

1883

V.-C. B.

Feb. 22, 27, 28.

C. A.

1884

June 17, 19, 21, 26.

BARLOW *v.* KENSINGTON VESTRY.

[1882 B. 1213.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 74, 75 [*Revised Ed. Statutes, vol. xvi., p.* 430]—*General Line of Buildings—House built on Vacant Land—House at Corner of Two Streets—Order of Magistrate—Reduction into Writing—Time of Service.*

The Plaintiff purchased a large piece of land abutting on a highway called the *K. Road*, on which were standing a public-house and several other houses fronting the highway. He pulled down the house, and made a new street through the piece of land, running into the *K. Road* at right angles with it, which he called *D. Gardens*, and sold portions of the land on each side of the new street to a builder. The builder erected a row of houses in *D. Gardens*, and the superintending architect of the Metropolitan Board certified the general line of buildings in *D. Gardens.*

The Plaintiff built a row of houses fronting the *K. Road*, one of which was at the corner of the *K. Road* and *D. Gardens.* The side of the corner house abutting on *D. Gardens* projected beyond the general line of buildings in *D. Gardens.* The house was not built on the site of any one of the old houses in the *K. Road*, but on the site of part of the garden of the public-house. A magistrate's order having been obtained by the vestry for the removal of the projecting part of the corner house, the Plaintiff brought an action to restrain the vestry from interfering with his house:—

Held, reversing the decision of *Bacon*, V.C., (1.) that the general line of buildings in *D. Gardens* extended to the *K. Road*; (2.) that the projecting part of the corner house was a new building and came within sect. 75 of the *Metropolis Management Amendment Act*, 1862, and not within sect. 74, which applies to existing buildings; and (3.) that although the corner house formed part of a row in *K. Road* it was also in *D. Gardens*, and the owner was bound to keep it within the general line of buildings of *D. Gardens.* The action was therefore dismissed.

Lord Auckland v. *Westminster District Board of Works* (1) distinguished.

An order was made by a magistrate under sect. 75 of the *Metropolis Management Amendment Act*, 1862, for pulling down the projecting part of a building within eight weeks. The order was made in the presence of the owner who was summoned, but was not reduced into writing and served on him till the day on which the eight weeks expired:—

Held, that the order was binding; the Act being silent as to service of the order on the owner, although it requires to be in writing.

IN the year 1875 the Plaintiff, *C. E. Barlow*, purchased a piece of land situate on the south side of *Kensington Road*, and extending southwards from that road to *Canning Place.* The property comprised a public-house called the *House of Call for all Nations*, a pastry-cook's shop which adjoined it on the east, and several other shops and buildings fronting the *Kensington Road*. The property was purchased by the Plaintiff with the intention of pulling down the old houses and building new houses of a superior kind, both along the *Kensington Road* and along a new street which he proposed to make at right angles to it. The Plaintiff commenced at once to pull down the old houses and put up boards advertising the land as building land. On the 1st of October, 1875, the Metropolitan Board of Works gave their sanction to the laying out of the new street, which was to be fifty-eight feet wide and to be called *De Vere Gardens*, and to extend from *Kensington Road* to *Canning Place*. The Plaintiff deposited with the Board a plan shewing the proposed street, in which no buildings were delineated as existing on the land fronting *Kensington Road*, except one building at some distance from the new road, which was marked "to be retained for the present." The rest of the land appeared to be vacant ground.

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(1) Law Rep. 7 Ch. 597.

The Plaintiff afterwards sold the land to Mr. *Elsdon*, a builder, who subsequently mortgaged a portion of it, which fronted on *Kensington Road*, to the Plaintiff. Mr. *Elsdon* proceeded to erect a row of dwelling-houses on the east side of *De Vere Gardens*. This row of houses stood back seven feet from the boundary of the roadway as set forth in the plan deposited with the Board of Works, the interval being taken up by the areas and porches of the houses. The row of houses did not extend so far northwards as the *Kensington Road*, but stopped about 120 feet short of it in order to give space for the row of houses which were being built fronting the *Kensington Road* at right angles to *De Vere Gardens*

The most westerly house of this row fronting *Kensington Road*, which stood at the north-east corner of the new road, extended in a westerly direction beyond the line of the front of the new houses in *De Vere Gardens*. It did not encroach upon the roadway, but was built close up to the pavement without leaving any space for an area, and there was a doorway in the western wall of the house fronting the pavement. While the house was being built an objection was made to it by the *Kensington* Vestry, and Mr. *Vulliamy*, the superintending architect of the Metropolitan Board, was called upon to decide upon the general line of buildings of *De Vere Gardens.* Mr. *Vulliamy* made his certificate on the 18th of October, 1881, which, after referring to the 75th section of the *Metropolis Management Act*, 1862, proceeded as follows: "And whereas Mr. *W. Weaver*, surveyor to the vestry of *Kensington*, and Mr. *W. Elsdon*, of &c., have appeared before me, and been heard regarding the erection of a house in *Kensington Road*, at the corner of *De Vere Gardens*, and beyond the face or front of the buildings forming a row of houses on the eastern side of *De Vere Gardens* aforesaid; and I have been required to decide the general line of buildings in such *Gardens*, as provided by the said statute: Now therefore, having considered the various matters, I, the undersigned, &c., do hereby, pursuant to the said Act, decide that the main fronts of the buildings forming the row of houses aforesaid, and tinted pink on the plan hereto annexed, and signed by me, is the general line of buildings on the eastern side of *De Vere Gardens* aforesaid."

The red line in the plan which marked the general line of buildings did not extend beyond the row of houses then built in *De Vere Gardens*, but if continued to the *Kensington Road* it would have cut off seven feet from the western end of the new house in *Kensington Road.*

Mr. *Elsdon* having declined to alter the plan of his house, complaint was made to Mr. *Shiel*, the police magistrate sitting at *Hammersmith*, who, on the 24th of January, 1882, made an order that Mr. *Elsdon* should, within eight weeks from that date, demolish so much of the dwelling-house as might be beyond the general line of buildings fixed by the superintending architect of the Board of Works.

Mr. *Elsdon* was present in Court when the order was made, but the order was not reduced into writing or served on him till the 21st of March, 1882, the last day of the eight weeks mentioned in it, or, according to some of the evidence, not till the 22nd of March.

The present action was brought by Mr. *Barlow*, as mortgagee of the house, against the vestry of *St. Mary Abbotts, Kensington*, asking for an injunction to restrain them from pulling down or interfering with any part of the dwelling-house in question.

Considerable evidence was gone into as to the question whether the site of the dwelling-house was vacant ground under the 75th section of the *Metropolis Management Act*, or the site of an old building. The result of the evidence was held by the Court of Appeal to be as follows:—

The old public-house called the *House of Call for All Nations*, stood on the ground now covered by the new road at the point where it entered the *Kensington Road*. The corner house, which was the subject of the present action, was built on the site of part of the garden or yard of the public-house, where there was a gateway or passage with trellis-work and a vine growing over it, but no part of the permanent buildings of the house.

The action came on for hearing before Vice-Chancellor *Bacon* on the 22nd of February, 1883.

Marten, Q.C., and *B. B. Rogers*, for the Plaintiff:—

The Defendants, the vestry in this case, have made precisely the same mistake as was made by the *Westminster* District Board of Works, acting upon the advice of the same gentleman, Mr. *Vulliamy*, in *Lord Auckland* v. *Westminster District Board of Works* (1). That is to say, they have proceeded under the 75th section of the *Metropolis Management Act*, 1862 (25 & 26 Vict. c. 102), which in the above case was held to apply only to houses built upon vacant land—not to houses built upon the site of older houses. The decision in Lord *Auckland's* case was criticised by *Jessel*, M.R., in *Kerr* v. *Corporation of Preston* (2), but not a word was said to disturb the authority of the case on the above point. The Act to which the attention of the Master of the Rolls was directed was the *Public Health Act*, 1875, and the proceedings were criminal, *i.e.*, were for the recovery of penalties, instead of being, as in Lord *Auckland's* and the present case, mandatory only.

That there is jurisdiction in this branch of the Court to grant the injunction asked for, appears from *Hedley* v. *Bates* (3), and *Great Western Railway Company* v. *Waterford and Limerick*

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(1) Law Rep. 7 Ch. 597.

(2) 6 Ch. D. 463.

(3) 13 Ch. D. 498.

Railway Company (1); cases which are further explained in *Stannard* v. *Vestry of St. Giles, Camberwell* (2).

This would be sufficient to dispose of the case, but we further say that the house in question does not stand in *De Vere Gardens*, and is not subject to the line of buildings of *De Vere Gardens*. The magistrate, before giving his decision, should have ascertained that there was a certificate from the Board of Works, declaring in what street the house stood. That was never done. The consequence is, that we were, and are, free to build where we like within our own limits.

Thirdly, the order is invalid on the ground that it was never properly served. The original order of the 24th of January, 1882, was not completed by being put into writing, or served on *Elsdon*, until the 21st of March, 1882, the last day of the eight weeks mentioned in it; and the Plaintiff was no party to the proceedings before the magistrate at all.

Millar, Q.C., and *Ingle Joyce*, for the Defendants, the Vestry:—

The case is an important one in this respect, that if the Plaintiff is permitted to do what he claims to have the right of doing, he will cut off the view of the park from all the other residents on that side of *De Vere Gardens*. He cleared his land of buildings in 1875, and they remained vacant till 1881. Since then the building of the whole street called *De Vere Gardens* has conformed to one line, certified by the architect of the Board of Works, except this one corner house, as to which the Plaintiff must be held to have waived any right he may have had of building up to the limits of his land.

Sect. 75 is admittedly obscure, but there is a clear decision upon it to the effect that a magistrate is entitled to judge for himself whether the line fixed by the certificate is in fact the general line of buildings in the street: *Simpson* v. *Smith* (3); and in a recent case of *The Queen* v. *Justices of Middlesex* (4) it was held that there was no appeal to quarter sessions against a justice's order under this section.

(1) 17 Ch. D. 493.
(2) 20 Ch. D. 190.
(3) Law Rep. 6 C. P. 87.
(4) 9 Q. B. D. 41.

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The decision in Lord *Auckland's Case* (1) has been misapprehended. The point really was that the site of the old house retained its right to be in a position to use the old thoroughfare. Here there is no question about an old thoroughfare. The only thoroughfare to which the Plaintiff's old house had, or could have, access, was *Kensington Road.* So that Lord *Auckland's Case* has no application, and the case falls within sect. 75. The view of the Master of the Rolls in *Kerr* v. *Corporation of Preston* (2) clearly was, that he had no jurisdiction.

The Plaintiff objects on the ground that he was no party to the proceedings before the magistrate. But, for reasons of his own, he took his mortgage after he had notice of the summons.

Sect. 75 requires the summons to be served on "the owner or occupier of the premises, or the builder." This summons was served upon *Elsdon,* who was the builder; and he cannot be heard to say he had no notice of the summons, for he was present when the case was argued before the magistrate. There was no occupier upon whom the summons could be served; and the service on *Elsdon* was sufficient: *Ex parte Johnson* (3); *Brutton* v. *Vestry of St. George's, Hanover Square* (4).

As to the drawing up of the order, it is universal practice that an order is effective from the moment it is pronounced, not from the time when it is drawn up.

This is a tribunal which has no power to adjudicate upon a magistrate's order. If this be a case not within sect. 75 which gives the magistrate jurisdiction, then the vestry have obtained an order which, whether right or wrong, they cannot carry out. The Plaintiff's contention is that the case is within sect. 74. We say that sect. 74 applies only to the taking down of an existing building in an existing street. No doubt the Plaintiff had a house in the *Kensington Road* called the *House of Call for All Nations,* but that has been covered by a road made at the Plaintiff's request, and sanctioned by the Board of Trade. As to this house all the Plaintiff's old "house rights" must be held to have been abandoned and extinguished. On the other hand, no amount of evidence can displace the fact that the present house is in

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(1) Law Rep. 7 Ch. 597.

(2) 6 Ch. D. 463.

(3) 3 B. & S. 947.

(4) Law Rep. 13 Eq. 339.

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De Vere Gardens. The name "*De Vere Gardens*" is on the wall of the house, and the door of the house opens into *De Vere Gardens.* Clearly, then, the case does not fall within the 74th section; and does fall within the 75th. Every step in the proceedings has been taken with studied regularity.

Marten, in reply.

BACON, V.C.:—

The main substance of this case is no doubt of very considerable importance.

The Plaintiff has built a large house upon his own land, and he is threatened by the vestry of *Kensington* that they will pull it down if he does not. Whether he pulls it down himself or waits till the vestry exercise their authority and pull it down, the value of his property must be greatly diminished. This Court, no doubt, sits for the purpose, amongst others, of protecting property, and this is a case which deserves the strict attention of the Court.

Now the main facts of the case are not in dispute. The Plaintiff was and is the owner of land fronting the *Kensington Road*, upon which were formerly several structures. They became his, and the particulars of them are shewn upon all the plans which have been referred to. It is beyond all question that whether it be the "*House of Call for All Nations,*" or the "entrance to the riding school," or the "confectioner's shop," or anything else, it was all his own land, and his to do what he liked with. Then somebody conceived that it would improve the neighbourhood, or probably the Plaintiff thought it would improve his property, if he turned his land into building land, and in order to make that undertaking effectual, he applied to the Metropolitan Board of Works for their sanction to his making a road through his own land from the *Kensington Road* to the southern boundary of his own land. He sent them in a plan upon which the projected road was described. The plan underwent some alteration, and at length it received the approval of the Metropolitan Board of Works. All their object was to provide that there should be a good carriage road and a good footpath, and that the limits and extent of each should be carefully and distinctly defined. They discharged their duty in that respect by approving the plan of the 1st of October, 1875. There is nothing about "line of buildings" on this plan. On an earlier plan which had been sent out there was a description of the line of buildings, but upon that plan nothing turns. It was intended that there should be houses built, and that is all that that line meant or signified. Upon this plan of the 1st of October, 1875, the boundary of the *De Vere Gardens* road is plainly and distinctly described by the outer line; and between two lines the word "pavement" is written. The outer line is all that the Metropolitan Board were concerned with. They had to see that there was an effectual line, and who built beyond it was no affair of theirs. It is not pretended that there was any house then built upon the land, and all that could be said of it was that there was a general intention of building beyond that line of pavement. It does not rest wholly upon this plan, though this is a very formal document. By it the Metropolitan Board of Works, through their chairman and superintending architect, certify the length and width of the street, and prescribe that barriers shall not be erected. They impose further conditions, and ultimately they direct that "the name of the new street shall be fixed upon posts at both ends of such street until the houses are built, when the name will have to be fixed according to law;" and the name "*De Vere Gardens*" is sanctioned. That is not all; because the superintending architect, on the 18th of October, 1881, made this certificate: "Whereas, by the 75th section of the *Metropolis Management Amendment Act*, 1862, it is provided that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of building in any street, place, or row of houses in which the same is situate," quoting the very words of the statute, "in which the same is situate;" and then it says in case the distance of such line of buildings from the highway does not exceed fifty feet, and so on. Then it goes on, omitting the rest of the recital, which only follows the Act of Parliament: "And whereas, Mr. *William Weaver*, surveyor to the vestry of *Kensington*, and Mr. *William Elsdon*, of *Victoria Road*, *Kensington*, have severally appeared before me and been heard regarding the erection of a house in *Kensington Road*, at the corner of *De Vere Gardens*, and beyond the face of the buildings forming a row of houses on the eastern side of *De Vere Gardens* aforesaid, and I have been required to decide the general line of buildings in such gardens as provided by the said statute," that is to say, the row of houses on the eastern side of *De Vere Gardens*. "Now, therefore, having considered the several matters, I, the undersigned, being the superintending architect to the Metropolitan Board of Works, do hereby, pursuant to the said Act, decide that the main fronts of the buildings forming the row of houses aforesaid, and tinted pink on the plan hereto annexed, and signed by me, is the general line of buildings on the eastern side of *De Vere Gardens* aforesaid." As I read that, it is not only in terms, but in sense and meaning, an exclusion of everything from the exercise of his jurisdiction except the eastern side of *De Vere Gardens*. But he makes it clear by a plan which he annexes and refers to, and this is done, be it observed, after hearing the representative of the vestry of *Kensington*, who had been examined that morning. Then if we turn to the plan, the line of pavement is as plain as it is in the plan signed by the chairman and architect. The line of the pavement is the true boundary of all that the Metropolitan Board of Works had to deal with; it goes on in a straight line up to the *Kensington Road*, and upon it, and within that line, is the house which is the subject of the present contention. There it is described and referred to in the certificate, and decided to be in *Kensington Road*, and having, therefore, nothing to do with the line of *De Vere Gardens*. In my opinion, nothing can be plainer than that, as far as the superintending architect was concerned, he then decided that the house in question was in *Kensington Road*, and that it was properly and duly built within the line which he had pointed out as being the line over which the jurisdiction of the Board of Works extended. As a matter of fact, in my opinion, it is clear that, proof having been adduced (as I have said) of the positive ownership of the Plaintiff of all the land, including *De Vere Gardens* and everything else, he surrendered, abandoned, and relinquished for the benefit of the public that which the order of the Metropolitan Board of Works applies to, and no more. Without any words being used he naturally reserved to himself the right of doing what he would with his own land, and upon his own land; and his own land, on which the house in *Kensington Road* is built, is not and never was a part of *De Vere Gardens.* True, the Metropolitan Board of Works say, "While things are going on, you shall put up at the end the name of *De Vere Gardens*, and when the buildings are finished that shall be its name." There is no harm in writing upon the side of the *Kensington Road* house that that side is on the same side as *De Vere Gardens*—but that does not alter the Plaintiff's rights—that does not take from him any power which he possessed—that does not make to be in *De Vere Gardens* the house which, by the certificate I have read and by the other evidence, is proved to be in the *Kensington Road* and nowhere else.

Now what ground is there for saying that this comes within the 75th section? I have read from Mr. *Vulliamy's* certificate a great part of the 75th section. Let us see again what the words are. What it refers to is the preserving of the symmetry of a row of houses, so that no man living in that row of houses shall be able to build out over his own area, or his garden, if there were one, so as to annoy his neighbours, or so as either to destroy the symmetry or the enjoyment of light and air. This is prohibited, unless the consent in writing of the Board of Works is obtained. Here, as I say, the consent in writing of the Board is clearly ascertained. They claim nothing, and they desire to interfere with nothing, except that which is coloured pink, which would exclude the Plaintiff's house. The words are these "no building" and so on "shall be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate." So that, unless I were to do violence to common sense and the plain evidence, I could not say that the house which the Plaintiff is claiming protection for is situate in any row of houses with which the Defendants have anything to do. The words are "any general line of buildings in any row of houses in which the same is situate." Then it says, "such general line shall be decided by the superintending architect." This has been done by the certificate I have referred to. Then it goes on to provide for the case of any building which shall offend against the prohibition or provision of the Act. The mode of proceeding before the magistrate is pointed out, and power is given to the vestry, if the person against whom the order is made fails to obey it, to do by their own hand and their own means that which the offender has been condemned to do. What power does that give to any magistrate to deal with anything but some structure in the row of houses, the building line of which is established? Anything more plainly *ultrà vires* than the order which the magistrate made cannot be conceived. The order made by the magistrate is against Mr. *Elsdon*. Mr. *Elsdon*, it appears, has nothing to do with it now, and the Plaintiff has nothing to do with what they ordered Mr. *Elsdon* to do; but the right which he had before the question arose, remains. He is building his house, upon his own ground, within the very limits prescribed by the Metropolitan Board of Works; and the house is proved beyond doubt, as a fact, to be in the *Kensington Road*, and not in *De Vere Gardens*. He had nothing to do with *De Vere Gardens*, but to surrender and give up his freehold estate for the purpose of forming a road, and that road is made in any line of building which the builder chose to prescribe in *De Vere Gardens*. There is no restriction on the part of the Metropolitan Board of Works; they do not proceed to say that that line of buildings shall be strictly followed; there is no such suggestion in the plan that was certified. The builders might have gone back twenty feet, and if they had, what would then become of the Plaintiff's house? It would have been standing out in the road, and it would then have been a complete obstacle to the light and air perhaps of the inhabitants of *De Vere Gardens*. But that would not have been through any act of the Plaintiff. He has done nothing but exercise his right as owner of this land to build upon his own land; and he has kept his word with the Board of Works, because he has not attempted to go beyond that line of pavement which they claimed and secured for the enjoyment of the public when they assented to *De Vere Gardens* being made into a road. In my opinion the magistrate was misled by the case put before him, he was made to believe that he had authority and he had none.

The fact mainly relied upon, as I gather from what some of the witnesses have said, is, that the Plaintiff has made a door in the western side of his house, and that he has made it to open into *De Vere Gardens.* In my opinion the Plaintiff had a right to make as many doors as he liked in his own wall, and he has a right, now that the pavement is dedicated to the public, to step out of his own house on to that pavement; and there was no power to restrict him or prevent him. However, the reasoning of the case has less to do with it than the strict legal right, which I have to consider, bearing in mind all the cases which have been referred to, especially *Lord Auckland* v. *Westminster District Board of Works* (1), which, as Mr. *Millar* demonstrated to me this morning, cannot in any degree be distinguished from this case, except only that *De Vere Gardens* did not previously exist, and the five cottages in Lord *Auckland's Case* did previously exist.

It is now said that because the Plaintiff's building comes to the edge of the pavement in *De Vere Gardens,* he impedes the view which the inhabitants of *De Vere Gardens* might by accident have to *Kensington Gardens.* It must have been an oblique view at all times. To the importance of this objection I have not given much consideration, but I am inclined to think that a more frivolous, trifling, and unreasonable suggestion could hardly be made, than that the gentlemen and ladies living in *De Vere Gardens* would complain of the Plaintiff for having built his house upon his own land, within the limits which the pavement indicates.

Then it is said that I have no jurisdiction. That was said, I suppose, because something must be said. I hope that I have jurisdiction to protect the owner of property against what seems to me to be a most wrongful act, although it is authorized by the order of a police magistrate under the statute. Of course the magistrate's order is entitled to all respect, and nobody will imagine that I fail in respect to his order or have anything to say against it, except that which the case forces me to say, namely, that, in my opinion, he has misread this Act of Parliament, and made an order which it was beyond his power to make, and which, as against this Plaintiff, is, and ought to be, inoperative.

As to the other points about the date of the order, the presence

(1) Law Rep. 7 Ch. 597.

of Mr. *Elsdon*, and the presence of the Plaintiff, I do not think they are material facts in the case, and I do not think I need dwell upon them. As to Mr. *Elsdon*, he cares nothing about it, and says the vestry may do what they like as far as he is concerned. Upon the main substantial facts of the case, I find the Plaintiff entitled to build the house in *Kensington Road* in the manner he has built it, although one side of it touches the pavement which he has surrendered to the public. Whether the vestry were instigated or not by memorials or anything else, I know not; I have not to inquire into that, nor have I anything to blame them for, except only that I have to decide that they had no right to avail themselves of an order which was *ultrà vires* of the magistrate who made it, and was not applicable to the facts of the case before me, nor within the purview of the Act of 1862.

I think, therefore, the Plaintiff is entitled to the injunction he asks, and that the vestry, or rather the ratepayers, unfortunately, I am sorry to say, must pay the costs.

There will be a perpetual injunction in the terms of the statement of claim.

J. B. D.

C. A. From this judgment the Defendants appealed. The appeal came on for hearing on the 17th of June, 1884.

Webster, Q.C., *Millar*, Q.C., and *Ingle Joyce*, for the Appellants, were stopped by the Court.

Marten, Q.C., *Rigby*, Q.C., and *B. B. Rogers*, for the Plaintiff, relied on the same arguments as in the Court below. They referred to the 25 & 26 Vict. c. 102, ss. 74, 75, 112, and cited *Lord Auckland* v. *Westminster District Board of Works* (1).

Millar, in reply.

1884. June 26. Cotton, L.J.:—

In this case, at the request of Lord Justice *Baggallay*, I will give judgment first. It is an appeal from the judgment of Vice-Chancellor *Bacon*, by which at the hearing of the action he

(1) Law Rep. 7 Ch. 597.

granted an injunction to restrain the Defendants, who are the vestry of *St. Mary Abbotts, Kensington*, from proceeding to pull down a portion of a house of which the Plaintiff is the owner, and the Defendants have appealed to us from that judgment.

The house in question is the corner house on the east side of the street which runs into *Kensington Road* at right angles, and which street, so far as the roadway is concerned at any rate, is called *De Vere Gardens*, and the ground on which the vestry was threatening to pull it down was this, that by the proceedings which had been taken under sect. 75 of the *Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. c. 102), under an order made by a magistrate, there had been a direction that so much of this house as projected beyond the general line of buildings in *De Vere Gardens* should be taken down; and inasmuch as it had not been taken down they were proceeding under the authority of the Act to pull it down. I shall presently refer to the particular circumstances under which the order was drawn up, but I will not deal with that question now, I will treat the order which was drawn up as an order put into writing which the Act requires immediately the decision of the magistrate was given, and I will deal with the objection in that respect after I have dealt with the other part of the case.

The Plaintiff is the owner or the mortgagee in possession of the house, and the order was not made as against him, but was made under the Act as against the builder, the then lessee, who was at the time building. What I will first consider, being the principal question, and the important question, which has been argued before us, is whether this portion of the house is liable to be pulled down under sect. 75 of the Act. Now, for the purpose of considering that it is necessary to inquire into the state of the land as it was before the present streets and houses were built there. Before the year 1875, which is as early as we need go, there was no road running at right angles towards *Kensington Road*, which runs east and west, but there were a number of houses facing the *Kensington Road*, and at the back there was a road and a riding-school. In that state of things the present Plaintiff bought a considerable block of land, one end of which abutted on the *Kensington Road*, for the purpose of a building speculation—for laying it out in new streets, and for letting or selling the land for building. Down the middle of this block of land he proposed to make a new road (I will call it road for the present), and for the purpose only of getting proper authority to make the new road, he was bound to lay plans before the Metropolitan Board, which he did. There was some difficulty about the plan which was actually sanctioned, but I think it is quite clear what it was. He first laid a plan before the Metropolitan Board, which purported to shew something about the buildings which were to be put up, but that was a matter with which the Metropolitan Board had nothing to do, and ultimately he laid before the Metropolitan Board a fresh plan, altering the name of the road which he proposed to make, and calling it "*De Vere Gardens.*" By this plan he shews a new road stretching from *Canning Place*, which was the southern end of the block of land he had bought, right through until it ran into the *Kensington Road*, and that road, from one end to the other, was a new road, and he called it *De Vere Gardens*. Then it is material to observe that there were houses in the northern part of this block which faced the *Kensington Road*, and among them a public-house called the *House of Call for All Nations*, the site of which was, with the exception of what I shall presently mention, on the ground occupied by the roadway of *De Vere Gardens*; but there was, besides the body of the public-house, a passage by its side, part of which apparently was covered with a trellis, over which a vine that grew by the side of the public-house was trained, and under this vine, and on the benches or seats, I suppose, would sit those who went to the *House of Call for All Nations* to take refreshments. That was what you may undoubtedly call a part of the *House of Call for All Nations*, but on that passage there was really no building; there was this trellis which supported the vine, and a wall, I suppose, on the other side, but whether there was or not, is to my mind not very material; and the portion of the building which was said to be offending against the 75th section is occupying the site, or part of the site, of that trellis-covered passage.

Now, in order to make this road it was necessary to take down, amongst others, the public-house called the *House of Call for All*

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Nations, but the roadway does not extend, as I have said, over the site of that trellis-covered passage. The trellis-covered passage abutted partly on a house occupied by a confectioner, and the site of it is now occupied by a portion of the Plaintiff's house which is now said to be offending against sect. 75. It was suggested to us at first (I think inaccurately), on the result of the evidence, that the whole of this land was at once cleared and made vacant land, and was so at the time when the plan was laid before the Metropolitan Board. I think that is inaccurate, but it is, to my mind, not really material. What was done by the Plaintiff was this. From time to time he sold to other persons portions of the land, and on these houses were, from time to time, built, but it is undoubted that when the roadway of *De Vere Gardens* was made, which must have been before the buildings could have been put up there, the public-house was pulled down, as it necessarily must have been in order to make that roadway. Before the Plaintiff's house was commenced, there had been a certain amount of building in *De Vere Gardens*, that is to say, houses had been built on the east side of *De Vere Gardens*, which came up to the sites of three houses which appear on the plans, two, there is no doubt, being in *De Vere Gardens*, and the third being the Plaintiff's house, which, or a part of which, is in question in this case. At the time, as I understand, when the two houses which are now immediately abutting on the Plaintiff's house, were not built, the Plaintiff, or the builder who then had the land, so began to build as to shew there would be a projection westward beyond the westward projection of the house which had been then built in *De Vere Gardens.* In that state of circumstances application was made under the Act to Mr. *Vulliamy*, the surveyor, in order to decide what was the general line of buildings (those are the words of the Act) in *De Vere Gardens.* It is called the building line generally, but it really is the general line of buildings, and he gave his decision, and we have his decision and the plans and the awards before us. It was argued before us that what he had laid down did not justify the contention on which the magistrate relied, that the portion of the Plaintiff's house, assuming it to be in *De Vere Gardens*, was beyond the general line of buildings in *De Vere Gardens.* It is put two ways, in the first place, that Mr. *Vulliamy* has not said that any part of this is beyond the general line of buildings in *De Vere Gardens;* and, secondly, that he has not said that this is in *De Vere Gardens* at all, that in fact, he has treated it as not in *De Vere Gardens.* In my opinion that is not correct. What Mr. *Vulliamy* did was this, he laid down a red line on the plan which was before him, which went as far as the northern end of the northernmost of the houses then existing in *De Vere Gardens.* It there stopped, because there was an intervening space not covered with a house between that and the house of the Plaintiff, and he had that line marked on the plan as shewing, according to his award, the general line of buildings in *De Vere Gardens,* on a reference to him to decide on a complaint that the Plaintiff's house was beyond the general building line. So that, in my opinion, the general line of buildings is laid down there for everything which is to be included properly in *De Vere Gardens;* and although it stops where the houses stop, that will shew, if it is a house within *De Vere Gardens* and if it is within the provisions of sect. 75, whether it has or has not offended. Therefore, I must consider that the general line of buildings in *De Vere Gardens* must be held to have been settled by the architect as running so as to leave a projection of this building of the Plaintiff's to the westward beyond it.

But that of course does not settle the question, for there are other serious points to be considered. The first point one has to consider is, whether this house is within the provision of sect. 75. Now that section, after repealing previous sections, says this: "Be it enacted that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate"—I need not read the rest. The first point is this: to what does that apply? Does it apply to a house which is built on the site of an old house which has been pulled down and which has occupied a more prominent position? By which I mean a position stretching farther towards the roadway than the other houses. In my opinion the rule was correctly laid down by Lord Justice *Mellish* and also by Lord Justice *James* (though not exactly in the same words) in the case of *Lord Auckland* v. *Westminster District Board of Works* (1), a case which has been much referred to. Lord Justice *Mellish* says, after referring to sect. 74, to which I may have to refer presently : "To make the two sections consistent with each other, I think that we must construe the words 'no building, structure, or erection,' in the 75th section to mean no building, structure, or erection built or erected for the first time." The language is imperfect ; "for the first time" requires some explanation. Of course every new house that is put up must be erected for the first time, but what he means obviously is this: a house which is not built as a restoration of an old house—a building which is not built as a restoration of an old building, but one which is to be considered as built *de novo* as regards the rights of a house. Although Lord Justice *James*, with reference to the certificate which was before him, which mentioned vacant land, uses the word "vacant," I think he really means the same thing, because he says (2): "I am of opinion, having regard to the old clauses in lieu of which this 75th section was enacted, and having regard to the 74th section which immediately precedes it, and to the whole context of the Act and the whole spirit of recent legislation with regard to dealing with private persons' property, that the 75th section was only meant to apply to the case of a new building, structure, or erection being built on land which, for the purposes of the Act, would properly have been described by Mr. *Vulliamy* as vacant ground." Mr. *Vulliamy*, who in the plan had laid down the building line in that case beyond *York Place*, had described a site of the old house which the plaintiff had bought, which was in fact pulled down, but under circumstances which shewed an intention to rebuild it, as "vacant land," and, therefore, although Lord Justice *James* does use the term "vacant land," in my opinion what he means, just as Lord Justice *Mellish* does, is this, that sect. 75 only applies to a house which may be called as regards the rights of a house a new house ; and if a man has a house which is pulled down, that house and everything which is called the house, if he shews an intention to rebuild it, is that which has the right of an ancient house as it stood ; and in that respect sect. 75 is consistent with sect. 74. Under sect. 74

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(1) Law Rep. 7 Ch. 606.

(2) Law Rep. 7 Ch. 604.

where a building which projects beyond the general line of the street (a very different thing to what we have in sect. 75) is pulled down, the authorities can require it to be thrown back, and may either require part of the site or the site to be thrown into the street, that is, into the public thoroughfare, or may require the building simply to be put back, but in either case paying compensation. I must observe here—and the Vice-Chancellor seems to have relied upon this, and it was also urged upon us in the argument—that it is not a case of giving up to the public any part of this ground. The Defendants do not require that this should be thrown into the public thoroughfare; the question is only this, whether, having regard to the provisions of the statute, this building has transgressed the building line. Of course there will be interference with the rights of the Plaintiff if they are entitled to pull it down, but it is not a question whether it is dedicated to the public under sect. 74.

Now can this house be called a new house, or a house built for the first time, within the meaning of those decisions and according to the true construction of the section? In my opinion it is. To my mind a great part of the fallacy of the argument on the part of the Plaintiff depended upon introducing the word "house" into sect. 75 instead of the words "house or building." Of course a house is a building, but every building is not a house, and there may be certain rights belonging to a house which cannot be said to belong to a building as such. But here, in my opinion, what was done at the time when this roadway was made did prevent the Plaintiff from alleging when he wished to build again on the piece of land covered by the seven feet that he was rebuilding the old house. The old house, the building of the house, was entirely gone. I refer to the public-house. It is very true that there was this annexe to it which, if the house called the *House of Call for All Nations* had been conveyed, would have passed by the conveyance. But that is really against the Plaintiff here; because the house was gone, and if the house was gone, then the rights of the house in respect of that which was a mere annexe to the house would go too; and when the public-house was pulled down, although pulled down under such circumstances that the Plaintiff must be considered

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as shewing an intention to rebuild, yet, in my opinion, if he did rebuild, what he shewed an intention to do was not rebuilding that house but building on the land. It was impossible to rebuild that house. It was pulled down under circumstances and for a purpose which rendered the rebuilding of the house utterly impossible. Therefore all rights in respect of that house were gone, and it cannot be said that when in building a part of a house principally occupying another site he puts part of it on what would have passed as matter of conveyance as part of the house called the *House of Call for All Nations*, he is rebuilding the *House of Call for All Nations*. He is not; he is wishing to take the piece of ground, which is really a vacant piece of ground, to use it in rebuilding the pastry-cook's shop; and to say that he is to be entitled to the rights, not of the pastry-cook's shop, but of the *House of Call for all Nations*, which he utterly destroyed as a house by pulling it down, seems to me absurd. In my opinion, therefore, this is not a house rebuilt with the rights of the old house, but a new house built for the first time with all the liabilities which attach to it.

It is said, however, that there is something in the judgment in *Lord Auckland* v. *Westminster District Board of Works* (1) which is against that view, and what I refer to is in Lord Justice *Mellish's* judgment (2). He says this: "Then the only other question on which there can be any doubt is, whether there is any difference between the actual site of the house and the court-yard, which was behind the house. In my opinion there is no difference. The front of the house was not towards *York Place* at all, but the side of the house ran all along *York Place*, and beyond that there was a continuous wall of some height, which separated the court-yard from *York Place*. Even assuming that there was a line of street in *York Place*, I do not think that would be an open space within the meaning of the 75th section. The plaintiff has a house, and a wall beyond his house which incloses his court-yard. His court-yard is as much a private place as any other part; it is not in any way dedicated to the use of the public." There Lord *Auckland* had retained the site of the house, and intended to rebuild upon it; therefore retaining the house as a house and rebuilding it as a house, he retained all the rights of the house in respect not only of the actual site of the old house, but also as regards that which was covered by the court-yard. But here it is just the contrary. The Plaintiff has entirely pulled down the old house, and having done that and prevented himself from in any way building up the house or restoring the house, he wants to insist upon the rights of the old house, the *House of Call for All Nations*, in respect of this which was never covered by any building, and which, when the public-house was pulled down, became, in my opinion, a vacant piece of ground, and not a piece of ground in respect of which any rebuilding of the house which was gone could be claimed on the part of the Plaintiff.

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(1) Law Rep. 7 Ch. 597.

(2) Law Rep. 7 Ch. 608.

But then it was said that it was within sect. 74. I have pointed out the difference between the enactments of sect. 74 and sect. 75. In my opinion the Plaintiff cannot in any way bring himself within sect. 74. Sect. 74 applies to a case where there is a house or building which projects beyond the line of the other houses regarded as an existing street. That cannot be said here. When this street was first made it involved necessarily the destruction of the house called the *House of Call for All Nations*, which, when pulled down for the purpose of making the road, left the arbour or vine-covered passage, as regards building, a vacant piece of ground, and one in respect of which there was no building projecting in any existing street within the meaning of sect. 74.

Before I pass from this part of the case, I think I ought just to say that *Lord Auckland's Case* (1), on which principally the Vice-Chancellor decided this case, in my opinion gives no assistance to the Plaintiff; possibly in one point which I shall have to consider it may be against him. In that case *York Place* ran at right angles, or nearly so, to another street. There had been a corner house which projected very close up to, and, I think, touched, the side of *York Place*, and then after passing a court-yard there was a recess and a row of houses which stood back some distance from *York Place*. Of course that was a house projecting beyond other houses towards the roadway of *York Place*; but it was a house in respect of which the rights of rebuilding were saved.

(1) Law Rep. 7 Ch. 597.

It had been pulled down by the railway company simply for the purpose of making their railway, and they sold their ground, which of course could only be made profitable by rebuilding the old house, which Lord *Auckland* proposed to build on the old site. Therefore it was not a house built for the first time, but it was a rebuilding of an old house in the eye of the law, so as to prevent sect. 75 from applying.

The next question we have to consider is this, Is this seven feet projection beyond the general line of building fixed by Mr. *Vulliamy* in *De Vere Gardens?* I have already expressed my opinion that it is. He lays down what the line is by shewing a red line going as far as the houses which were clearly in *De Vere Gardens*, and a projection of that line will cut off the seven feet which are in dispute in the Plaintiff's house.

But then there is another point, of course, which we have to consider before we can decide this case, which is this: The 75th section enacts "that no building, structure or erection shall . . . be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate." The contention was that it could not be said that this was a building in *De Vere Gardens*, and here there comes out with considerable force that fallacy which arose from substituting the word "house" for the word "building" which exists in the Act. It was said (and this seems to have prevailed with the Vice-Chancellor) that a house cannot be in two streets, that a house is either in *Kensington Road* or in *De Vere Gardens*, that this house is in *Kensington Road*, and that, therefore, it cannot be in *De Vere Gardens*. Now really that is a double fallacy. It is a fallacy to substitute the word "house" in the Act of Parliament for the word "building," and it is a fallacy to use language which we make use of for the purpose of describing the place to which we are to go and to which we are to direct our letters. When you say that a house is a house in such and such a square, what you mean is that that is the way in which you describe it. It is No. 1 or No. 2 in a particular square, or it is No. 1 or No. 2 in a certain street. It is perfectly clear that physically some houses are partly in one street and partly in another, but for the matter of description we take one street, one square only; and as a rule, for the purpose of description, we refer to the house as being in the place in which its principal front is, and not always where its principal entrance is. People who have corner houses in squares, although the entrance doors are in the side street, like it better to be described as being in the square than as being in the adjoining street. However, that is mere description. It is obvious that a house may be partly in two streets: it may run right through from one street to another, although it may be described by a number in one of those streets. But the real fact is the word "house" is not used here, and although for the purposes of description this may be called a house in *Kensington Road*, yet what we have to consider is, whether there is a "building, structure or erection" in *De Vere Gardens* beyond the building line. Now is this or not in *De Vere Gardens?* "Building, structure or erection" may of course apply to part of a house just as much as to the principal front of a house. Is this, therefore, in *De Vere Gardens?* In my opinion it is. *De Vere Gardens* is the name given to the roadway for the first time constructed shortly after 1875. It ran as a new roadway from *Canning Place* right through into the *Kensington Road*, and went beyond the site where this erection and building stands.

We were told that various architects and various authorities have put a different construction upon the language, and have always allowed corner houses, when the principal front is in another street, to project beyond into the line of building in the street in which their side is. I entirely decline, in construing Acts of Parliament, to be influenced by any opinions expressed by any surveyor or other person. If it is desirable that the law should not be as I understand the present Act of Parliament to make it, of course Parliament can interfere. If on one side of *De Vere Gardens* there is a row of houses facing all the same way, reaching up to *Kensington Road*, which I understand to be the case, and if on the other side the last building is the side of a house, whose principal front is in *Kensington Road*, can it be said that *De Vere Gardens* ends at the corner on one side and short of the corner on the other? In my opinion that is all *De Vere Gardens* right down to its intersection with and running into the *Kensington Road*. In my opinion, therefore, there is here a house newly erected subject to the Act; there is a portion of the house, that is, a building, structure or erection in *De Vere Gardens* projecting beyond the general line of buildings in *De Vere Gardens.*

I ought to mention in passing, that reliance was placed on different language used in some other parts of the Act of Parliament which enacts that parts of the building offending may be pulled down, but here it is the offending building. No doubt the language varies. It may be necessary in order to remove the obstruction to remove the whole building, and the whole building may be projecting. It is very possible that there might be a building projecting. You are to pull down the whole building if it is necessary; or you are to pull down part of the building if that will remove the obstruction which does offend by going beyond the general line.

But then there was another objection taken, which we ought to deal with. The 75th section requires that an order shall be made in writing by a magistrate directing the removal of the offending building within a reasonable time to be fixed by the magistrate by his order in writing. Here the order being made by the magistrate not in writing, but the order having been made on the builder being summoned, on the 24th of January, eight weeks' time was given and the order in writing was only drawn up either on the day or the day before the time expired. It was said that was wrong, and, therefore, that the vestry were acting entirely without authority. But in my opinion that objection, which would necessitate going again before the magistrate, cannot prevail. The order recites that the matter was heard on a certain day, and recites what was necessary to enable the order to be made, and then it directs the builder to pull down this offending projection within eight weeks from a day in January. That is drawn up just at the expiration of the time, but it recites that the parties had notice a long time before, and the order fixes this as a reasonable time. The order is put into writing only to enable the compulsory proceedings to be taken if the parties do not choose to obey the directions which have been given by the magistrate. In my opinion, therefore, the objection that this order was not drawn up or served within a proper time cannot prevail. The Act says nothing about service, although, of course, a man ought to have notice of it.

Therefore the action of the Plaintiff entirely fails, the vestry being entitled, in my opinion, to proceed under the powers which by the Act of Parliament are given in such a case. It would not be reasonable, I think, that the vestry should at once proceed to pull down the offending portion of the building. The Plaintiff has been disputing the validity of the order, and at first with success, and, of course, it is an important question; so I think the better course will be that although the appeal will be allowed the order discharging the judgment of the Vice-Chancellor shall not be drawn up for six weeks, so as to give the Plaintiff, if he desires to do so, the opportunity of altering the structure of the house and of removing the offending portion.

LINDLEY, L.J.:—

I am of the same opinion. After the elaborate manner in which the facts have been investigated by Lord Justice *Cotton* my observations will be very few. I start with this, that the power given by sect. 75 of the *Metropolis Local Management Act*, 1862, is one of those very arbitrary powers which require to be narrowly watched, and certainly I think every member of the Court feels bound to look very carefully at what has been done to see that no house is pulled down unless the demolition is authorized by the Act of Parliament when it is construed accurately and carefully.

Now in order to appreciate this case it seems to me to be very important to ascertain exactly the state of things when the old house existed, because, for some time there was a little obscurity about that, and until the obscurity was removed there was considerable ground for contending that the case fell not within sect. 75 but within sect. 74, and that the decision in *Lord Auckland* v. *Westminster Local Board of Works* (1) applied to it. When the state of the old property is ascertained, as it is by reference to the maps which are in evidence, it is, I think, clear that there never was upon the site of the offending portion of this building any building whatever. There was a yard and there

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(1) Law Rep. 7 Ch. 597.

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was a trellis work, and a vine over it, but the offending portion of this building does not replace any building which previously existed. The space which intervened between the confectioner's shop and the public-house, the *House of Call for All Nations*, was not in any way covered by the old building, which, if the old houses had remained, and this street, *De Vere Gardens*, had been driven through them, could be set back under sect. 74 upon compensation being given. I think Mr. *Rigby* was right in inviting our attention to that state of things, and if it had appeared that after driving this street through the old buildings there would have been an old building projecting so that the present house could be considered as built on the site of that projecting house, then I think *Lord Auckland's Case* (1) would have applied, and we should have been bound to hold that the case was within sect. 74 and not sect. 75. The facts displace that altogether. This offending portion of the house does not represent any house, which, if it had stood, would have been projecting or could have been set back under sect. 74. Looking then at sect. 75 we must examine the words with care, and the first thing we must look at is this (it is a question of fact): Is this offending portion of the house in a "street, place, or row of houses" known by the name of *De Vere Gardens*, or is it not? Because if it is not, sect. 75 does not apply. That depends of course upon what is meant by the expression "street, place, or row of houses," and with reference to that it does not seem to be unimportant to look at the plan which Mr. *Elsdon* the builder laid before the Metropolitan Board of Works, and which the Metropolitan Board of Works sanctioned. Taking that plan, what was there meant by the "street, place, or row of houses" to be called *De Vere Gardens* is delineated with accuracy. The line of buildings is not delineated. I bear that in mind. The place or street, or whatever it is, to be called *De Vere Gardens*, and to be sanctioned under that appellation, was the street or place accurately marked out upon this line, which upon that plan denoted the line of area east and west. That was the street which ran right up into *Kensington Road*. The offending portion of this building is in that street, so understood in that sense of the word. I think there can be no doubt

(1) Law Rep. 7 Ch. 597.

at all about it. The house is not. Lord Justice *Cotton* has explained the ambiguity of that expression. If a house is called No. 5 in some place in *Kensington Road* that is a mere description for the sake of convenience of reference; but the actual situation of this strip of land upon which the offending part of this house is, can, I think, only be said to be in *De Vere Gardens* in the true sense in which the builder used the expression when he got out the plan, and in the true sense of the expression in sect. 75 of the Act of Parliament.

Having got so far, then comes this question. Does the house project beyond the line of buildings in that street? Now the question whether it does or does not must be decided with reference to the general line of buildings, and the general line of buildings must be ascertained by Mr. *Vulliamy*. It is to be observed that whilst the Legislature has entrusted to Mr. *Vulliamy*, the architect of the Metropolitan Board of Works, the power of deciding where the general line of buildings in the street is, it has not entrusted to him the power of deciding in what street a particular offending structure may be. He cannot for example certify that this particular offending structure is in *De Vere Gardens* or that it is in *Kensington Road*. That is not left to his decision. That is to be found out as best it can, like any other disputed fact, but having got the fact that part of the house is in *De Vere Gardens*, then the question of where the general line of buildings in *De Vere Gardens* is, is to be decided by Mr. *Vulliamy*, and as far as I can see, he has decided that rightly. Nobody I believe can question it; but that is perhaps a moot point which is now under consideration. At all events the Act of Parliament says he is to decide and by his certificate he did decide it, and taking the line of building in *De Vere Gardens* as delineated in the sketch annexed there can be no question that the second point is made out—that this offending portion projects beyond that building line. This is really decisive in favour of the view taken by the vestry on the facts and on what I may call the merits of the case.

It was put to us very powerfully by the counsel for the Plaintiff that this is a very harsh interpretation, and one which requires to be applied with very great care, and it was argued that if this construction was right the owner of the corner house might have been forced to set his house back, nobody knows to what extent, if the person who built the houses in *De Vere Gardens* chose to build them far back. We must bear in mind in considering any argument of that kind the peculiar circumstances of this case. Mr. *Elsdon*, who bought the property from Mr. *Barlow* and cleared it for building, mortgaged this particular house back again to Mr. *Barlow*, and *Barlow* was in effect in a position to determine by bargain or otherwise where the general line of buildings should be; and we may suppose that he looked after his own interests; and he was content to sell those bits of land which are now covered with houses upon the assumption that the building line of *De Vere Gardens* should be where it is. He could have stipulated that it should be nearer the pavement if he liked. What he has done is this. He has pulled down all the houses in *Kensington Road* and has sold lots to persons upon the faith of *De Vere Gardens* running up to *Kensington Road*, and upon the faith that there should not be any break in that line of building (that is plain enough) and having got a piece of land left he thought there was space enough to build three houses upon it, whereas he ought to have been content with two. So much for the merits. There is no hardship in the case. I am satisfied that in what we are doing we are merely holding him to his bargain.

But that is apart from the legal question. The legal question is, Where is the offending portion of the house? Is it in *De Vere Gardens*, and does it project beyond the general line of buildings? My answer to that is that it is in *De Vere Gardens*, and it does project.

Now I pass to another point which requires attention, though it is a purely technical one; I mean the point that no order in writing was served in proper time. The 75th section requires that the order of the magistrate shall be in writing, and that that order shall limit a reasonable time for the builder to demolish his house, and then it says that in default of the building being demolished within the time limited by the order, the vestry may demolish the house. The true construction, I think, is this, that the builder is not bound by any order which is not in writing. There must be an order in writing, and he must have a limited time, and a reasonable time, and that reasonable time must be given to him by the order in writing, and therefore it did appear to me at one time to be a very forcible observation that he had not had a reasonable time given by this order in writing. Let us see how that matter stands. It would not, I apprehend, be competent for the Court to differ from the magistrate as to whether a given time was or was not a reasonable time, unless it could be shewn that it was not under the circumstances a reasonable time. Now, with regard to the circumstances of this case it is not right to say that the time limited in this order was not reasonable. On the contrary, I think it was reasonable. The facts are peculiar, and are as follows: In the first place there is nothing in the Act of Parliament which says anything at all about service of the order. The actual working of the order may be ascertained from *Jervis's Act* (1), and by that no service of the order in writing is required. The method in *Jervis's Act* is this: There is to be a summons in writing, and then whenever required the order is to be drawn up in the proper form, and there is no provision in *Jervis's Act* for serving anything in writing except under sect. 17, where service is required of a mandatory order for the purpose of committing a man to prison; so that when we have pressed upon us the argument that the order has not been served, the answer is that the Act of Parliament does not require it. What we have in substance is this: Mr. *Elsdon* was summoned before the magistrate on the 14th of November, there were several adjournments, and on the 29th of November the case came on, and on the 24th of January the order was actually made. It gave the builder eight weeks within which to pull the house down; but the order was not formally put into writing or served until the eight weeks were nearly out. *Elsdon* says in his examination that he received the summons, that he attended it, that he was present at all the adjournments, that he was present when the final order was pronounced, and that he knew all about it, and made inquiries about it, and we know by his proceedings, and by the proceedings of the present Plaintiff, who is the mortgagee, that there never was any controversy about the time not being a reasonable time. The controversy was on a different question altogether. The controversy was whether the magistrate had jurisdiction to make the order. I think the magistrate was entitled to say, having regard to what has taken place, that eight weeks from the 24th of January was a reasonable time. I observe that the Plaintiff in his pleadings does not controvert that. His objection goes to the substance of the thing—that this offending portion of the house is not in *De Vere Gardens*, and that the magistrate had no jurisdiction at all. It appears to me that the objection started by Mr. *Marten* in respect of this order of the magistrate is untenable, and although I quite agree that we ought to look very carefully at the Act to see that this power of ordering a house to be pulled down is not abused, I have come to the conclusion that the order of the magistrate was right, that he had jurisdiction to do what he did, and that there is no ground whatever for restraining the vestry from acting upon it.

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(1) 11 & 12 Vict. c. 43.

I propose, therefore, in order to make it quite clear what the decision of the Court is, to declare that so much of the house in the pleadings mentioned as projects beyond the general line of buildings in *De Vere Gardens*, as decided by Mr. *Vulliamy* in his certificate of the 18th of October, 1881, is situate in *De Vere Gardens*, and was erected therein beyond such general line of buildings without the consent in writing of the Metropolitan Board of Works; and then discharge the order of the Vice-Chancellor with costs, both here and below.

I quite agree that this order should not be drawn up for six weeks, so that the parties may come to some arrangement if they can. It is quite possible that some arrangement may be made by the builder and the Board of Works under sect. 76, which may result in some kind of amicable settlement being made. However, that is for them to consider.

BAGGALLAY, L.J. :—

I have had an opportunity of considering the circumstances of this case very fully with my colleagues, and I entirely agree in the views that have been so fully expressed by them; but being

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myself a ratepayer of *Kensington* parish I preferred and thought it right that those views should be expressed by them, and that I should simply express my concurrence in them without going into details.

Solicitors: *Last & Sons; Pontifex, Hewitt, & Pitt.*

M. W.

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NORTON *v.* COMPTON.

[1882 C. 922.]

Practice—Appeal—Admission of Fresh Evidence—Claim in Administration Action—Order, whether interlocutory or final—Rules of Supreme Court, 1883—*Order* LVIII., *rr.* 4, 15.

Although an order made on a summons by a creditor in an administration action is considered as if interlocutory for the purpose of determining the time within which an appeal must be brought, for other purposes it is a final order, and therefore fresh evidence cannot be given on the appeal without the special leave of the Court.

IN this case an order was made by Mr. Justice *Pearson* on an adjourned summons rejecting the claim of a creditor on the estate of a testator which was being administered in the action. The order was made on the 7th of July, 1883; the appeal was brought within three weeks, but was set down in the general list of final appeals.

Cozens-Hardy, Q.C., and *Bardswell,* for the Appellant, proposed to read an affidavit which had been filed since the hearing in the Court below.

Methold, for the Respondent:—

We object to the reading of the affidavit on the ground that although the order is treated as an interlocutory order within Order LVIII., rule 15, which settled the time within which an appeal must be brought, yet for all other purposes it is a final order, and fresh evidence cannot be admitted without special leave. Order LVIII., rule 9, puts orders in winding-up and in matters not being actions on the same footing; that is, the appeal must be brought within twenty-one days, but it does not declare them to be interlocutory.

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Cozens-Hardy, Q.C., and *Bardswell*:—

The order is interlocutory for all purposes. In *Pheysey* v. *Pheysey* (1) Lord Justice *James*, in deciding that an appeal from a similar action to the present must be presented within twenty-one days, said, "It appears to me that this was pre-eminently an interlocutory order. The order was made in a suit instituted for the purpose of dealing with the testator's estate, which must be cleared from all claims before the final order on further consideration can be made." And his Lordship also said, referring to the memorandum of the 10th of November, 1875 (2), which directed that summonses under winding-up orders or in administration suits should be heard by the full Court of Appeal, "It was not intended by that memorandum to define what is an interlocutory order; but having regard to the importance of matters continually determined on interlocutory appeals, it was thought, as a matter of judicial discretion, that it was right for three Judges to hear the appeals from orders finally determining the rights of parties, although, strictly speaking, they might have been heard by two only." According to that judgment this is an interlocutory order, although it is heard by three Judges, and we therefore claim the right to read fresh evidence under Order LVIII., rule 4.

BAGGALLAY, L.J.:—

We are all of opinion that orders on summonses in administration actions are in the nature of final orders, although, in order not to impede the administration of estates the appeal must be brought within the same time as is limited for appeals from interlocutory orders. The affidavit cannot therefore be read without special leave.

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(1) 12 Ch. D. 305, 306, 307.

(2) 1 Ch. D. 41.

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COTTON, L.J.:—

The question turns on Order LVIII., rule 4. In reading the clause permitting further evidence on appeals from interlocutory orders we must read it in connection with the alternative clause following it, which says that "upon appeals from a judgment after trial or hearing of any cause or matter upon the merits such further evidence shall be admitted on special grounds only." That clause is quite wide enough to include a claim by a creditor in an administration action. Though it is in form interlocutory, it is a final decision of the claim on the merits.

LINDLEY, L.J.:—

I quite agree. I look on a summons such as this as an action under another form. The objection must be allowed.

Solicitors: *Letts Brothers; Carr & Co.*

M. W.

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In re ADAMS AND THE KENSINGTON VESTRY.

[1883 A. 625.]

Lease—Option to purchase Fee Simple—Nature of Interest conferred on Lessee—Real and Personal Representatives—Will—Construction—Precatory Trust.

A lease of land contained a covenant by the lessor with the lessee, his executors, administrators, and assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs or assigns, then the lessor, his heirs or assigns, would accept £1200 for the purchase of the fee simple, and on the receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, and nearly twenty years after his death, but before the expiration of the term, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, and a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him:—

Held (affirming the decision of *Pearson*, J.), that, on the true construction of the covenant the option to purchase was attached to the lease and passed with it; that it consequently passed as part of the lessee's personal estate to the administrator, and that the administrator could not make a

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good title to the purchaser unless the next of kin of the lessee concurred in the sale.

Green v. *Low* (1) distinguished.

A testator gave all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, "in full confidence that she would do what was right as to the disposal thereof between his children, either in her lifetime or by will after her decease":—

Held (affirming the decision of *Pearson*, J.), that under these words the widow took an absolute interest in the property, unfettered by any trust in favour of the children.

not equitable!

THIS was an appeal from an order of Mr. Justice *Pearson* (2).

The matter came before the Court on a summons under the *Vendor and Purchaser Act*, 1874.

On the 25th of November, 1882, an agreement was entered into between *Charles Adams* and the vestry of the parish of *St. Mary Abbotts, Kensington*, for the sale by *Adams* to the vestry of a piece of land situated at *Notting Hill*, for which the vestry had given notice to treat under the Act 57 Geo. 3, c. xxix.

The abstract of the vendor's title commenced with a lease dated the 30th of September, 1819, by which *John Smith* demised some property at *Notting Hill* (which included the land agreed to be sold to the vestry) to *Ralph Adams* for the term of sixty years from the 24th of June, 1819, at the annual rent of £60. The lease contained a covenant by *J. Smith* for himself, his heirs, executors, and administrators, with *Ralph Adams*, his executors, administrators, and assigns, "that if the said *Ralph Adams*, his executors, administrators, or assigns, shall at any time or times hereafter be minded or desirous of purchasing the fee simple and inheritance of the said piece or parcel of land and premises hereby demised, and of such desire shall give notice to the said *J. Smith*, his heirs or assigns, then he the said *J. Smith*, his heirs or assigns, shall and will within one calendar month next after the receipt of such notice at his own expense make out a title to the said piece of land and premises, and also accept and take the sum of £1200 in full for the purchase of the said fee simple and inheritance, and on receipt thereof shall and will at the costs and charges of the said *Ralph Adams*, his executors or administrators, convey the said fee simple and inheritance, free from incumbrances, to the said *Ralph Adams*, his heirs and assigns, or as he or they shall direct or appoint."

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(1) 22 Beav. 625.

(2) 24 Ch. D. 199.

Ralph Adams died intestate on the 14th of January, 1858, leaving *Ralph Adams* the younger, his eldest son, *Charles Adams* (the vendor), his second son, and nine other children, and his widow him surviving. *Ralph Adams,* the younger, died in March, 1866, intestate, and without having been married, leaving his brother *Charles Adams* his heir-at-law and also heir-at-law to *Ralph Adams* the father. Letters of administration to the estate of *Ralph Adams* the father were on the 17th of August, 1876, granted to *Charles Adams.*

The reversion in fee of the property comprised in the lease of 1819 became vested, subject to that lease, in *George Smith.* He died on the 20th of February, 1861, having on the same day executed a will in the following terms: "I give, devise, and bequeath all my real and personal estate and effects whatsoever and wheresoever unto and to the absolute use of my wife, *Harriet Smith*, her heirs, executors, administrators, and assigns, in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease." The testator appointed his sons *G. H. Smith* and *S. S. Smith* his executors, who proved his will on the 4th of April, 1861.

In 1877 *Charles Adams* gave notice to *Harriet Smith,* the widow of *George Smith,* of his decision to exercise the option of purchasing the property comprised in the lease of the 30th of September, 1819, in accordance with the covenant therein contained, and on the 6th of July, 1877, *Harriet Smith*, in consideration of £1200 paid to her by *Charles Adams,* granted the property comprised in the lease to *Charles Adams* in fee, subject to the benefit of the lease. The £1200 was paid by *Charles Adams* out of his own money.

Under these circumstances the vestry took two objections to the title shewn by *Charles Adams*:—

1. That the next of kin of *Ralph Adams* the father or their representatives were the persons entitled to the benefits of the option to purchase, and that a good title could not be made without their concurrence in the conveyance. 2. That under the will

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of *George Smith* his widow did not take an absolute interest in the property devised to her, but took it subject to a precatory trust for the benefit of the children of *George Smith*, and that the concurrence of these children must be obtained.

On a summons being taken out under the *Vendor and Purchaser Act* to obtain the opinion of the Court on these points, Mr. Justice *Pearson* held (1) that the option to purchase the inheritance was attached to the lease and formed part of the lessee's personal estate, and therefore that *J. Smith* could not make a good title without the concurrence of the next of kin of the lessee; and (2) that the widow of *G. Smith* took an absolute interest in the property devised to her unfettered by any trust in favour of the children: and he made an order accordingly. The vendor appealed against the first part of the order and the vestry gave cross notice of appeal against the second.

F. Pownall, for the vendor, on the first appeal:—

The covenant to convey the inheritance was quite unconnected with the lease. It was a real covenant which descended to the heir. It was an immediate equitable interest in *Ralph Adams* and his heirs, and was in the nature of real estate. The executor of the lessee could not sell the option with the lease: *Daniels* v. *Davison* (1); *Kingdon* v. *Nottle* (2); *Lawes* v. *Bennett* (3); *London and South Western Railway Company* v. *Gomm* (4); *Green* v. *Low* (5); *Sheppard's* Touchstone (6); *Winter* v. *D'Evreux* (7); *Dart's* Vendors and Purchasers (8); *Edwards* v. *West* (9); *Rayner* v. *Preston* (10). Whoever purchases the freehold in exercise of such an option does so as trustee for the heir-at-law of the lessee: *Randall* v. *Russell* (11); *Hardman* v. *Johnson* (12).

Smart, for the vestry, was not called on.

(1) 16 Ves. 249, 253.
(2) 1 M. & S. 355.
(3) 1 Cox, 167.
(4) 20 Ch. D. 562, 580.
(5) 22 Beav. 625.
(6) 7th Ed. vol. i. p. 175.
(7) 3 P. Wms. 189, n. (B.)
(8) 5th Ed. vol. i. p. 266.
(9) 7 Ch. D. 858.
(10) 18 Ch. D. 1.
(11) 3 Mer. 190.
(12) Ibid. 347.

BAGGALLAY, L.J. :—

The question on this first appeal comes before us upon a statement of facts giving, as it appears to me, all the information we require, and perhaps all that we are entitled to require, for the disposal of this case; and I am bound to say that it appears to me that it is a question which really turns upon the terms of the lease of 1819, and that the cases to which Mr. *Pownall* has referred, although they bear upon a very important branch of the law, will not aid us in the decision of the case with which we are now dealing.

The lease, which was dated the 30th of September, 1819, was a lease for sixty years from the month of June in that year, and was between Mr. *John Smith*, the lessor, and Mr. *Ralph Adams*, the lessee. It was in respect of certain property situate at *Notting Hill.* There was contained in that lease a covenant entered into by Mr. *John Smith* for himself, his heirs, executors, and administrators, with *Ralph Adams*, his executors, administrators, and assigns, in the ordinary form of a covenant in a lease of this description; and it went on as follows after various other covenants :—[His Lordship read the covenant and continued :—] The reversion in fee of the property which was made the subject of the lease became vested in a Mr. *George Smith*, who died in 1861. It is not necessary to trace his title. In 1861 he made his will, and by that will he gave, devised and bequeathed all his real and personal estate and effects whatsoever and wheresoever unto and to the absolute use of his dear wife *Harriet Smith*, her executors, administrators and assigns, "in full confidence that she will do what is right as to the disposal thereof between his children, either in her lifetime or by will after her decease," and he appoints his two sons executors. Upon that gift in the will of *George Smith* the second question arises, which forms the subject of the second appeal, as to whether, there being a universal devise and bequest to Mrs. *Smith*, a trust was created in favour of the children having regard to the terms of the will. As to that I say nothing now, because we have not yet heard the argument. *George Smith* died in February, 1861, shortly after the date of his will, leaving his wife and certain children him surviving, and the will was proved. Then *Ralph Adams* died intestate on the 14th of January, 1858, leaving *Ralph Adams*, his eldest son, *Charles Adams*, the vendor, his second son, and nine other children, and also a wife him surviving. *Ralph Adams* the son died in March, 1866, unmarried and intestate, leaving *Charles Adams*, the vendor, his heir-at-law, and as such heir-at-law of *Ralph Adams* the father, and letters of administration to the estate of the said *Ralph Adams* the father were on the 17th of August, 1876, granted to *Charles Adams* the vendor. So that now we have *George Smith*, the original testator, dead, all his real and personal property bequeathed to his wife, and we have *Ralph Adams* the father dead, and in the events which have happened his second son, *Charles Adams*, is his heir-at-law and also his administrator, *Ralph Adams* having died intestate.

Now I think that *Lawes* v. *Bennett* (1) decided that, where there is a contract giving an option of purchase of real estate and the option is not exercised till after the death of the person who created the option, nevertheless the proceeds of the sale go as part of his personal estate and not as part of his real estate. The effect of that would be, as applied to the case with which we are now dealing, that the £1200 of purchase-money would form part of the personal estate of *George Smith* who died and not part of his real estate, and upon this principle, that he, being a party who created an option, the contract, as it were, would have a retrospective action and would relate back to the time when he created the option, and that therefore it would go, although not paid till after his death, as part of his personal estate and not as part of his real estate. In the events which have happened that would be immaterial; that I take to be the real effect of the decision in *Lawes* v. *Bennett.*

Then, of course, there would be a difference as regards the effect of the exercise of the option of *Ralph Adams* after the death of his father. There, although the option was created in the lifetime of his father, the option was not exercised till after the death of his father, and therefore, according to the view which I take of it, there would be no retrospective action whatever; it would only be a binding contract, as it appears to me, when the option is exercised, and that is the period to which we should

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(1) 1 Cox, 167.

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have to look. In *Edwards* v. *West* (1), which was before Mr. Justice *Fry*, it was attempted to extend the principle of *Lawes* v. *Bennett* (2) to the person exercising the option, *Lawes* v. *Bennett* only having decided as regards the party giving the option. The view which I take was supported by Mr. Justice *Fry*.

After the death of *Ralph Adams* the option was exercised, and I will take the way in which the option was exercised from the recital contained in the deed which conveyed the property in consequence of the option having been so exercised. That indenture was dated the 6th of July, 1877, and made between *Harriet Smith* of the one part, and *Charles Adams*, the vendor, of the other part. It recites that *Charles Adams* was heir-at-law and legal personal representative of *Ralph Adams*, deceased, and was the person then entitled to exercise the option to purchase the said fee simple and inheritance, and recites that *Charles Adams* had in pursuance of the said covenant for sale therein-before mentioned given to *Harriet Smith* a notice in writing that he was desirous of purchasing the fee simple and inheritance of the said pieces of land for the said sum of £1200; and then it goes on to convey them to him, his heirs and assigns, in consideration of the £1200 so paid to Mrs. *Smith*.

The question arises here because the vestry of *St. Mary Abbotts, Kensington*, have entered into a contract to purchase this property from Mr. *Adams*, and the question is raised whether Mr. *Charles Adams* can make a good title to the property by himself. It is said that if he was entitled to make a purchase for his own benefit alone, he alone could make a good title to the property in conveying to the vestry. The objection raised by the vestry is: They say, "No, you are not the person who is entitled to take the property as for your own benefit; you could only exercise that option as the administrator of your father, who died intestate. As administrator of your father you had to deal with his personal estate for the benefit of all his next of kin; you had no powers of sale, and therefore it is necessary that your *cestuis que trust*, those for whom you are acting, should join in the conveyance." Is that contest on the part of the vestry correct? I think it is. As I said before, I do not think this turns upon any effect to be given to, or upon the application of, any principles enunciated in the main authority to which reference has been made. It turns simply upon the terms of the contract, and the contract depends upon the terms of the covenant contained in the original lease. It provides that if *Adams,* his executors, administrators, or assigns, should be minded and desirous of purchasing, he or they should give notice. Of course, it being a leasehold property, in the absence of any notice being given converting it into freehold in the lifetime of *Ralph Adams,* the property would descend to his executor if he appointed one, or to his administrator if he did not appoint one, as part of his personal estate. *Ralph Adams* having died intestate, and without having given any notice in his lifetime, it can hardly be disputed that his leasehold property passed to his administrator upon his taking out administration. Then the option which is now to be exercised, not having been exercised by *Ralph Adams* in his lifetime, the person who is to exercise it after his death is his administrator, and no one else. No doubt we have to bear in mind that the administrator, who had to exercise the option, was also his heir-at-law; but as heir-at-law of his father he had no right whatever to exercise the option in any way. It was in his capacity as administrator, and subject to the equities and duties which his position as administrator imposed upon him, and in that capacity only, that he could exercise the option. Of course if the option was exercised by *Ralph* in his lifetime, he was exercising it for his own benefit; but can it be supposed that his executor or administrator after his death would be minded and desirous of exercising that option if it was not for the benefit of those whom he represented in his capacity of administrator, or that he would be desirous of exercising it for the benefit of another person, namely, the heir-at-law of the testator? In that view of the case it appears to me, first of all, that the right of option, as one of the provisions contained in the lease, passed with the leasehold estate to the administrator upon his taking out administration to the deceased intestate, and that he alone was capable of exercising that option.

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(1) 7 Ch. D. 858.

(2) 1 Cox, 167.

That appears to me to decide the question. I decide it entirely upon the terms of that particular covenant. It was only in the capacity of administrator of the deceased intestate that *Ralph Adams* had the right to exercise this option and to call for a conveyance of the freehold estate, and inasmuch as he exercised that option and called for a conveyance of the freehold estate as the holder of the leasehold interest, so the benefit to be derived from any exercise of that option by him in his capacity of administrator must be for the benefit of the same parties as those for whom he held the leasehold interest. On these grounds it appears to me that Mr. Justice *Pearson* has arrived at the right conclusion, and that this appeal must be dismissed.

COTTON, L.J.:—

I am of the same opinion. The case was very fully and ably argued by Mr. *Pownall*, but I quite agree with Lord Justice *Baggallay* that in this case it must depend upon the terms of the contract. The contract is one entered into with the lessee, his executors, administrators, and assigns, and before I go further I agree that this covenant would be one the benefit of which would pass with the assignment of the lease, because it is a covenant with the lessee, if he, his executors, administrators, or assigns shall give a certain notice, that the lessor would convey. The " assigns " there must mean the assigns of the lease, and it is entirely different from the case which was referred to by Mr. *Pownall* of *Green* v. *Low* (1), where there being not a lease, but an agreement for a lease, there was superadded to that an independent contract that if the person who had the right to get a lease gave notice, then the lessor, the owner of the estate, would sell it to him ; and the Master of the Rolls held that though the right to the lease was gone, there was an independent agreement to grant the fee if demanded within a certain time. What the Master of the Rolls said shews that this must depend upon the particular form of the contract in each case, and must depend upon the true construction of it. The Master of the Rolls said that, upon the true construction of the contract, the right to purchase was independent of the right to a lease, and he decreed the specific performance of the agreement to sell. That is entirely different from this case, where the option given is to the lessee, his executors, administrators, and assigns. There the Master of the Rolls recognised the principle, which, of course, could not be disputed, that in such a case the true effect of the contract must depend upon the construction of the particular document. Now what is there here? If *Adams* had during his lifetime exercised the option, undoubtedly his heir would have had the benefit, because he made himself the owner of the inheritance by exercising the option. But he did not. Then the contract goes on, that if he does not execute it his executors, administrators, or assigns may execute it. They may by giving notice give themselves a right to have this estate on payment of £1200. Now, it is very true that here the person who gave the notice was not only administrator, but was also the heir-at-law. He was not the assign of the leasehold interest, he was simply exercising that option, having regard to the terms of the contract under which he was giving it, as administrator, not as heir-at-law; and therefore *primâ facie* giving it as administrator, though he happened also to be heir-at-law, he would acquire what he got by virtue of the notice in the character in which he was entitled to give, and did give, the notice. Then it was said that the contract goes on that if the notice is given, then the owner of the inheritance will convey the fee simple of the inheritance free from incumbrances "to the said *Ralph Adams*, his heirs and assigns." Undoubtedly, as I have already said, if *Adams* had exercised this option then the heir-at-law would have been entitled to the estate made equitably that of *Adams* by exercising the option. But it was said that it was to be conveyed to the heirs and assigns. This contemplated really an exercise of the option by *Ralph Adams*, and then a conveyance to *Ralph Adams* and his heirs and assigns; it does not in terms apply to the event which has happened, the exercise of the option, not by *Ralph Adams*, but by the administrator, and the only way of giving effect to this, though it is not done in terms, is by conveying the fee simple and inheritance. But that will not determine who is entitled to the beneficial enjoyment of it. The administrator, by virtue of a notice which he gives in his character of administrator, gets a right to the fee simple, and of course the conveyance must be to him, and to his heirs and assigns, but he nevertheless will hold for the benefit of those

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(1) 22 Beav. 625.

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who are entitled to the personal estate, and therefore, in my opinion, the decision of Mr. Justice *Pearson* in this case was right.

I have not thought it necessary to refer to any of the cases except that one which turned on the particular form of the contract, because they really do not apply, and of course there is a very different principle applicable where there is a contract entered into with a person who is the owner of the inheritance, who is entitled to take the benefit of that contract, from a case like this, where there is an option given to a lessee, and if he does not exercise the option then to his executors, administrators, and assigns. The "assigns" must mean the assigns of the leasehold interest. The executors and administrators are pointed out as the persons who hold that position, and then, although the heir does happen to be the administrator, his position is divisible; he exercises the option as administrator with all the consequences which affect him.

LINDLEY, L.J.:—

I am of the same opinion. It appears to me that we must deal with the question in this case with reference to the peculiar language of the covenant which is before us. Everything turns upon the language of the covenant, and I do not see how our decision in this case would be of the slightest use to anybody else any more than the decisions in the previous cases are of the slightest use to us in construing this covenant. The covenant is made by *Smith*, the lessor, with *Adams*, his executors, administrators, and assigns, and so on. Now I apprehend "assigns" there must mean the assigns of the lease; the context, I think, shews that. In the event which has happened there have been no assigns, and we may leave that out. If he did not exercise the option, his administrator could. The covenant is that, if he, his executors, administrators, or assigns, shall at any time be minded or desirous of purchasing the fee simple, and of such desire shall give notice to *Smith*, his heirs or assigns, then he, *Smith*, his heirs or assigns, will, within a month next after the receipt of such notice, at his own expense make out a title to the land, and accept and take £1200 in full for the purchase of the fee simple and inheritance. Now stopping there, there is nothing at all which gives the heir any right whatever. The right is given to the lessee, his executors, administrators, and assigns, and it is given to them in language which is very peculiar. It is "if they be minded and desirous of buying the fee simple," not "if the heir-at-law is." I cannot possibly construe this as meaning that the heir is to set them in motion, and that the heir is to be minded and desirous of buying; I cannot construe the covenant in that way at all. They are to be minded, and they are to say whether they will have it or not. Then it does not say by whom the £1200 is to be found; but upon receiving that, then the lessor agrees to convey the fee simple of this property at the costs and charges of *Adams*, his executors or administrators, so that they are to pay for it. If they are minded to give the notice they are to give it. They are to pay for the expense of the conveyance. It does not say in so many words that they are to pay the purchase-money, but it is upon receipt of the purchase-money that the vendor agrees to convey the fee simple. So far it is perfectly intelligible.

Now come the words which alone are embarrassing, because the covenant goes on in this way, "On receipt thereof, shall and will at the costs and charges of the said *Ralph Adams*, his executors and administrators, convey the said fee simple and inheritance free from incumbrance to the said *Ralph Adams*, his heirs and assigns, or as he or they shall direct or appoint." That is the very first time that the word "heirs" occurs. Is that alluding to any connection with the purchaser? It is not heirs "or" assigns. It is, convey the fee simple to *Adams*, his heirs "and" assigns, that is, to *Adams* in fee—not providing, as I understand, for the event which has happened of the notice being given by the administrator or executor—and requiring the conveyance of the fee to be made to him or them. That is omitted. It is an imperfect expression. It does not exhaust all possible cases, and it is simply because the word "heirs" is there introduced that this heir says that, contrary to the true construction of this covenant, he is entitled to buy and to keep the fee himself. It appears to me to be quite contrary to the language of this covenant. That disposes of this particular objection.

Smart, for the *Kensington* Vestry on the second appeal:—

The devise in *G. Smith's* will did not give an absolute interest to his widow, but created a precatory trust for his children. Words of recommendation are sufficient to create a trust unless there are clear words shewing an intention that the devisee should have absolute enjoyment of the property. Here the words importing enjoyment of the property are sufficiently met by giving her a life interest only: *Jarman* on Wills (1); *Briggs* v. *Penny* (2); *Wood* v. *Cox* (3); *Wace* v. *Mallard* (4); *Webb* v. *Wools* (5); *Gully* v. *Cregoe* (6); *Palmer* v. *Simmonds* (7); *Shovelton* v. *Shovelton* (8); *Irvine* v. *Sullivan* (9); *Curnick* v. *Tucker* (10); *Le Marchant* v. *Le Marchant* (11); *In re Hutchinson and Tenant* (12); *Lambe* v. *Eames* (13).

[COTTON, L.J., referred to *Lord Ranelagh* v. *Melton* (14).]

F. Pownall, for the vendor, was not called on.

BAGGALLAY, L.J.:—

The question involved in this appeal is whether, having regard to the trusts of the will of *George Smith,* a trust is created in favour of the children of the testator.

The will is a very short will, and is as follows: "I give, devise, and bequeath all my real and personal estate and effects whatever and wheresoever unto and to the absolute use of my dear wife *Harriet Smith,* her heirs, executors, administrators, and assigns, in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease."

I think if it was not for authority, or alleged authority, no one would have any difficulty in construing this will according to what would appear to be the plain and evident intention of the testator. The observations of the Master of the Rolls in *In re*

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(1) 4th Ed. vol. i. pp. 385, 388.

(2) 3 Mac. & G. 546.

(3) 2 My. & Cr. 684.

(4) 21 L. J. (Ch.) 355.

(5) 2 Sim. (N.S.) 267.

(6) 24 Beav. 185.

(7) 2 Drew. 221.

(8) 32 Beav. 143.

(9) Law Rep. 8 Eq. 673.

(10) Ibid. 17 Eq. 320.

(11) Ibid. 18 Eq. 414.

(12) 8 Ch. D. 540.

(13) Law Rep. 6 Ch. 597.

(14) 2 Dr. & Sm. 278.

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Hutchinson and Tenant (1) appear to me to apply as clearly to the form of devise and bequest in this case as to that which was before him. Referring to the words which are alleged to imply a precatory trust, he says, "In my opinion these words, standing by themselves, independently of authority, are not intended to impose any obligation on the widow. They are merely an expression of the testator's wishes and belief as distinguished from a direction amounting to an obligation. His widow is to have power to give the property to any one she may think fit: she is to be complete owner of the property, but he expects her to dispose of it among his family, that is, his children. There is no occasion to tell her that she is to provide for herself, there being already a prior absolute gift to her. If you make the power override the absolute gift, the wife gets nothing, for you could then only give her an interest by inserting in the power something which is not there, namely, the word 'wife.' If you do not put in that word, you make her a trustee for the testator's family, that is, his children only; for there is no reported case in which the word 'family,' when used by a married man, has been held to include his wife as well as his children." Those words appear to me to be as fully applicable to the will which is now under consideration as that which was then under consideration. There can be no doubt, as stated by Mr. Justice *Pearson* when this case was before him, that there is some conflict between modern authorities on subjects of this kind and the older authorities, and the question arises in a case of this kind which authorities ought to be followed. In this case many of the older authorities had been cited before him, as they have been cited before us to-day, and he came to the conclusion that the principle enunciated by Lord Justice *James* and Lord Justice *Mellish* in the case of *Lambe* v. *Eames* (2) is applicable to the case under consideration. Now, Lord Justice *James*, in the course of his judgment in the case of *Lambe* v. *Eames*, made an observation in which I thoroughly and entirely concur, "Now the question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family

(1) 8 Ch. D. 540, 542.

(2) Law Rep. 6 Ch. 597, 599.

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never meant to create trusts, must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this Court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise." Now a somewhat curious circumstance in this case is that we are actually called upon to construe this will of Mr. *George Smith* in the absence of the parties on both sides who may be interested in having this construction decided. We have neither the wife nor the children here, but the wife having sold the property in the capacity, or assumed capacity, of being able to sell, the purchaser from her has assigned the property to another purchaser, and that purchaser says that he has not got a good title. Under those circumstances we have neither the wife nor the children here to argue the question of construction. Fully concurring, as I do, with the observations of the learned Judges in *Lambe* v. *Eames* (1), I agree with Mr. Justice *Pearson*, and I think he was right in considering that the principles enunciated in that case were applicable to that which we are now considering, nor have we found anything in the authorities that would militate against this decision, which would clearly come within the particular words of the will which Mr. Justice *Pearson* had to construe. At the same time, I agree with what Mr. Justice *Pearson* said, that there being a different view adopted by Courts of Equity in more recent years from what was adopted some years ago as regards what were called precatory trusts, it has long been decided that those views are not to be extended, and I think we should be extending them if we were to apply them to the case now under consideration.

I think the conclusion at which Mr. Justice *Pearson* has arrived is the true view.

COTTON, L.J.:—

I am of the same opinion. The question before us is whether, upon the true construction of the will of *George Smith*, he imposed

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(1) Law Rep. 6 Ch. 597.

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upon his wife *Harriet* a trust. Now just let us look at it, in the first instance, alone, and see what we can spell out of it, and see what was expressed by the will. Reading that will, and I will not repeat it, because it has been already read, it seems to me perfectly clear what the testator intended. He leaves his wife his property absolutely, but what was in his mind was this: "I am the head of the family, and it is laid upon me to provide properly for the members of my family—my children: my widow will succeed me when I die, and I wish to put her in the position I occupied as the person who is to provide for my children." Not that he entails upon her any trust so as to bind her, but he simply says, in giving her this, I express to her, and call to her attention, the moral obligation which I myself had and which I feel that she is going to discharge. The motive of the gift is, in my opinion, not a trust imposed upon her by the gift in the will. He leaves the property to her; he knows that she will do what is right, and carry out the moral obligation which he thought lay on him, and on her if she survived him, to provide for the children. But it is said that the testator would be very much astonished if he found that he had given his wife power to leave the property away. That is a proposition which I should express in a different way. He would be much surprised if the wife to whom he had left his property absolutely should so act as not to provide for the children, that is to say, not to do what is right. That is a very different thing. He would have said: "I expected that she would do what was right, and therefore I left it to her absolutely. I find she has not done what I think is right, but I cannot help it, I am very sorry that she has done so." That would be the surprise, I think, that he would express, and feel, if he could do either, if the wife did what was unreasonable as regards the children.

But, then, it is said there is authority against that, and I am in no way disposed, if there be any definite canon or rule of construction established, to depart from that, because that must introduce great uncertainty. But undoubtedly, to my mind, in the later cases, especially *Lambe* v. *Eames* (1) and *In re Hutchinson*

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(1) Law Rep. 6 Ch. 597.

and Tenant (1), both the Court of Appeal and the late Master of the Rolls shewed a desire really to find out what, upon the true construction, was the meaning of the testator, rather than to lay hold of certain words which in other wills had been held to create a trust, although on the will before them they were satisfied that that was not the intention. I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shews that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe, and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true construction of the will, a trust imposed upon her. Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will. In my opinion, here he has expressed his will in such a way as not to shew an intention of imposing a trust on the wife, but on the contrary, in my opinion, he has shewn an intention to leave the property, as he says he does, to her absolutely.

LINDLEY, L.J.:—

I am entirely of the same opinion. If we look at the will with the desire to understand it and see what it is the testator has expressed to be his intention, I cannot come to any other conclusion than that he intended to leave this property to his wife.

It is very true that he goes on to say (in terms which, having regard to the cases, he had better not have said), that he trusted her to do what was right as to the disposal of his property between his children. It is clear that every man trusts his wife to do what is right if he leaves all his property to her; but this testator has been unfortunate enough to say so, and we have to construe his will because it is contended that he says so in such a way

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(1) 8 Ch. D. 540.

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as to turn his wife into a trustee for the children. I quite agree that some cases have gone very far and have imposed upon words a meaning beyond what they bear if looked at alone, apart from the authorities. I am glad to see that Lord Justice *James* had the courage to stem the tide, and I find, in the last case I know of before the Privy Council, they have taken the same view. It is the case of the *Mussoorie Bank* v. *Raynor* (1), in which a man gave his widow the whole of his real and personal property, feeling confident that she would act justly to their children and divide the same whenever occasion required it of her. The words there are not quite the same as here, but what the Privy Council said there was this: "Passing to the merits of the case, their Lordships are of opinion that the current of decisions now prevalent for many years in the Court of Chancery shews that the doctrine of precatory trusts is not to be extended." I am very glad to see that the current is changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator. We cannot find that intention here, and the appeal must be dismissed.

Solicitors: *Lucas & Sons*; *Pontifex, Hewitt, & Pitt.*

M. W.

In re BOWN.
O'HALLORAN *v.* KING.

[1882 B. 4293.]

C. A.
1883
KAY, J.
July 17, 18, 25.
C. A.
1884
July 22.

Married Woman—Bequest to Separate Use—Restraint on Alienation—Income-bearing Fund.

Where a testator makes a bequest to a married woman for her separate use absolutely, and follows it by a clause restraining her from anticipation, the question whether the restraint on anticipation is effectual does not depend on the question whether it is a gift of an income-bearing fund or of a sum of cash, but whether the testator has or has not shewn an intention that the trustees should keep the investment and pay the income to the married woman.

A testatrix directed her trustees to raise and invest a sum of £4500, and to pay the income to *B.* during her life, and after her death to hold two shares in trust for two of her nieces for life, and then for their children, and as to one other share to pay it to the daughters of a deceased niece, and as to the remaining share to pay it to *H.*, a married woman, for her separate use without power to anticipate the same, and her receipt alone to be a sufficient discharge.

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(1) 7 App. Cas. 321, 330.

Held (reversing the decision of *Kay*, J.), on the construction of the will, that on the death of *B.*, *H.* was entitled to receive the capital of her share, notwithstanding the restraint on anticipation.

In re Ellis' Trusts (1) distinguished. *In re Clarke's Trusts* (2) questioned. *In re Croughton's Trusts* (3) followed.

SPECIAL CASE.

Susan Bown by her will, dated the 16th of September, 1875, gave all her real and residuary personal estate to trustees upon trust to sell and convert, and after payment of her debts to raise thereout the sum of £4500, and to invest the same in or upon certain securities therein mentioned, with power to vary the investments and to stand possessed of the stocks, funds and securities constituting such investments, and the annual income arising therefrom, upon trust for *Robert Bown* for life, and after his decease, as to £1000 part of such investments and the future annual income thereof, in trust to pay the same annual income to her niece *Elizabeth Peren* for and during the term of her natural life, and from and after her decease to stand possessed of the said sum of £1000 and the investments in or upon which the same might be invested and the future annual income thereof in trust for and to pay and divide the same unto and between such of the daughters of the said *Elizabeth Peren* as were therein mentioned; and from and after such decease as aforesaid of the said *Robert Bown*, as to £1000 other part of the said trust fund of £4500 and the future annual income thereof, in trust for and to pay the same annual income to her niece *Martha Adams* for and during the term of her natural life, and from and after the decease of the said *Martha Adams* to stand possessed of the said sum of £1000 and the investments in or upon which the same might be invested and the future annual income thereof, in trust for and to pay and divide the same unto and between such of the children of her niece *Martha*

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(1) Law Rep. 17 Eq. 409.

(2) 21 Ch. D. 748.

(3) 8 Ch. D. 460.

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Adams as were therein mentioned; and from and after such decease as aforesaid of the said *Robert Bown*, as to £1000 other part of the said trust fund of £4500, to stand possessed thereof in trust for and to pay and divide the same unto and between such of the daughters of her late niece *Jessie Hayes* as were therein mentioned; and from and after such decease as aforesaid of the said *Robert Bown*, as to £1500 remaining part of the said trust fund of £4500, in trust for and to pay the same to her niece *Bessie O'Halloran* for her sole and separate use, and in the event of the death of the said *Bessie O'Halloran* in her lifetime the testatrix directed her said trustees to stand possessed of the last mentioned sum of £1500, in trust for and to pay and divide the same unto and between such of the children of the said *Bessie O'Halloran* living at her decease as should as to sons attain the age of twenty-one years, or as to daughters should attain that age or marry, and if more than one in equal shares. And the testatrix declared that "the interest which any female may take under this my will, shall be for her sole and separate use, independent of the debts, control or engagements of any husband with whom she may be now and hereafter be intermarried and without power to anticipate the same, and for which her receipt alone shall be a sufficient discharge."

The testatrix died in 1881.

Bessie O'Halloran was married in 1870 to the Plaintiff *J. C. O'Halloran.*

Robert Bown died in 1882, before the legacy of £4500 had been raised or invested.

The Defendants, the trustees, had invested the sum of £1500 to answer the legacy of £1500.

The Plaintiffs, Mr. and Mrs. *O'Halloran*, claimed to have the capital as well as the interest of the said legacy of £1500 paid to the duly authorized agent of the Plaintiff *Bessie O'Halloran* at once, or as soon as the moneys secured on the said mortgage and further charge can be called in.

A special case was authorized under Order XXXIV., in which the opinion of the Court was asked whether Mrs. *O'Halloran* was entitled to have the capital paid to her or to her agent.

The special case came on for hearing before Mr. Justice *Kay* on the 17th of July, 1883.

Seward Brice, for the Plaintiffs:—

This is not a gift of an income-producing fund as in *In re Ellis' Trusts* (1), but an absolute gift of £1500 in money, to be paid to *Bessie O'Halloran* for her separate use and without any directions for investment, and this being so, although the legatee is a married woman, and there is a restraint on anticipation, she is entitled to have the legacy paid over to her upon her separate receipt *In re Croughton's Trusts* (2); *In re Clarke's Trusts* (3); *Re Sykes' Trusts* (4).

At the conclusion of Mr. *Seward Brice's* argument, Mr. Justice *Kay*, addressing Mr. *P. S. Gregory* who appeared for the Defendants, said I will look into the cases, and let you know if I desire to hear you.

1883. July 25. Kay, J., after stating the facts as set forth above, said:—

I reserved judgment that I might consider some recent cases that were cited. It was argued that where a fund given absolutely to a married woman is not an income-bearing fund the Court will order it to be paid to her, notwithstanding that she is restrained from anticipation, but that it is otherwise where the fund produces income, or where the restriction is expressed to be not merely of anticipation, but of alienation.

On principle I can see no reason for this distinction. A clause restraining anticipation is construed as meaning that the married woman shall not assign her interest; whether the words are without any power of "alienation" or of "anticipation," the effect is the same. Why should this clause be operative only if the fund produces income? If it did produce income the only mode in which the income could be anticipated would be by assigning or charging the future payments of it. An assignment of all the future income would be an assignment of the capital. But the main consideration is that the restraint upon anticipation annexed to the separate estate of a married woman, however expressed, has always been held to be a limitation of her power of alienation for the purpose of protecting her interest more effectually against the possible influence of her husband. Suppose a fund thus restricted to be paid into Court as cash, would it not be the duty of the Court to direct it to be invested, and to order the income to be paid to the married woman? If so, this would be the duty of the trustee, and if there be none other, the husband is trustee for a wife who has separate property. In this way every fund to which a married woman is entitled for her separate use may be considered an income-bearing fund.

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(1) Law Rep. 17 Eq. 409.
(2) 8 Ch. D. 460.
(3) 21 Ch. D. 748.
(4) 2 J. & H. 415.

In *Baggett* v. *Meux* (1) there was a devise of real estate to, and a bequest of personal estate in trust for, a married woman absolutely with a direction that she should not sell, mortgage, or incumber the property, and that she should have the same for her separate use. The word "anticipate" was not used. The husband and wife joined in a beneficial lease to Messrs. *Meux*. It was held by Vice-Chancellor *Knight Bruce* to be void in equity, and this was affirmed by the Lord Chancellor, who said, "After the case of *Tullett* v. *Armstrong* (2) there can be no doubt about the doctrine of this Court respecting the property given to the separate use of a married woman: and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal."

In *Re Sykes' Trusts* (3) there was an appointment by will of a share of stock to a married woman for her separate use, and so that she should not while under coverture "make any sale, mortgage, charge, or incumbrance of or upon the same, or of the annual income thereof." It was argued in that case that a restraint on anticipation has no application to a gross sum. Lord *Hatherley* held that a written promise by the lady to pay an advance was not binding, because "the lady had no power to bind herself by such engagements, and any debt arising out of the transaction is not hers, but her husband's. To allow it to be treated as her debt, she being subject to a restraint on anticipation, would be entirely to overthrow the whole protection which is given to married women by Courts of Equity." The language used shews that his Lordship did not recognise any distinction between anticipation and alienation. In that case there had been some attempt to make a settlement by the married woman of the funds, and Lord *Hatherley* seems to have doubted whether the trusts of that settlement might not have attached, and directed an inquiry whether they had been formally authorized by the married woman. The Chief Clerk certified that the trusts were not finally authorized, and thereupon Lord *Hatherley* directed that the fund, which was in Court, should be paid out to the married woman. I have sent for the Registrar's book, and I find that the order was in form an order for the sale of the stock, and payment of the proceeds of it to the married woman. This certainly was not upon the ground that it was not an income-bearing fund, for it had always been invested in consols, and no such point was suggested in the argument. Nor was it because there was a restraint of anticipation only; the restraint was not of anticipation, but of alienation. The only ground mentioned in the argument was that a restraint on anticipation has no application to a gross sum, *Baggett* v. *Meux* (1) not being referred to. But this could hardly have been the reason, because the charge was held to be invalid, expressly on account of the restraint. I cannot understand why, if the restraint upon alienation was binding so that she could not make a valid charge upon the fund, the Court could order it to be paid out to her. The two parts of the judgment seem inconsistent.

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(1) 1 Coll. 138, affirmed 1 Ph. 627, 628.

(2) 4 My. & Cr. 377.

(3) 2 J. & H. 415, 419.

In *Re Sarel* (2), a case before the same Judge, where the words were, "so as that the same shall not be alienable," it was held that the Court was bound to retain a share of the residue bequeathed absolutely to the married woman, which had been paid into Court during her coverture, and only pay the dividends to her. In *Re Gaskell's Trusts* (3), again before the same Judge, the words being, "not to be anticipated, or assigned over, or precharged in any way," *Re Sykes' Trusts* (4) was cited, but so far from following it, Lord *Hatherley* held, on the authority of *Baggett* v. *Meux* (1), that the property could not be dealt with during the coverture, and ordered the fund to be retained in Court, and the dividends only paid. His Lordship there said that "in every case since *Baggett* v. *Meux* and *Tullett* v. *Armstrong* (2) the Court has sought to protect the wife during coverture."

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(1) 1 Coll. 138, affirmed 1 Ph. 627, 628.

(2) 10 Jur. (N.S.) 876.

(3) 11 Jur. (N.S.) 780.

(4) 2 J. & H. 415.

This decision is absolutely inconsistent with *Re Sykes' Trusts* (3), and, in the reports which I have seen of the case in the *Jurist* and *Law Times*, which are the only reports I can find, although *Re Sykes' Trusts* was cited, no explanation of it was given by Lord *Hatherley*. I cannot resist the conclusion that the order for payment of the fund to the married woman in *Re Sykes' Trusts* was made inadvertently, and that Lord *Hatherley*, on further consideration in the two cases I have last mentioned, declined to follow his own previous decision.

Certainly these authorities afford no ground for the argument that there is a distinction between anticipation and alienation, or between a fund bearing income and a sum of cash. The point was not raised or suggested in any of them, nor, so far as I am aware, in any reported case except those I am about to mention.

In re Ellis' Trusts (4), where there was a legacy to a married woman of £500 Consols for her separate use without power of anticipation, the late Master of the Rolls, after referring to the judgment of Vice-Chancellor *Knight Bruce* in *Baggett* v. *Meux* as a clear expression of his opinion, "that, so far as restraint on anticipation is concerned, there is no distinction between capital and income," quotes the words I have read from the judgment of the Lord Chancellor in the same case, and continues:— "That shews that the Lord Chancellor thought there was no distinction between real and personal estate, between *corpus* and income. Though I find no direct decision on the point, I think there is sufficient authority to enable me to say there is no distinction between personal estate producing income and real estate producing rent. I repeat that I decide nothing as to the effect of a clause restraining anticipation where no income is produced."

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(1) 1 Coll. 138, affirmed 1 Ph. 627, 628.

(2) 4 My. & Cr. 377.

(3) 2 J. & H. 415.

(4) Law Rep. 17 Eq. 409, 413.

That last observation refers to an ingenious argument of Mr. Justice *North*, who was counsel in the case, that a clause restraining anticipation only could not have any effect where the fund produced no income, because there would be no income to anticipate, thus distinguishing the effect of the words "anticipation" and "alienation." I dissent from the argument, because a clause restraining anticipation has always been held to mean that a married woman may not assign such interest as she has. The observations of the Master of the Rolls, which I have quoted, shew that he considered the authorities were adverse to the argument before him. In *In re Croughton's Trusts* (1), where the restraint was "so that she shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation," which is a very common form of the restriction, and shews that the word "anticipation" includes a sale, mortgage, or charge, Vice-Chancellor *Bacon*, after saying that he did not see the difference between anticipation and alienation (in which I entirely agree), ordered the fund, which was in Court in the shape of cash, to be transferred to the married woman, relying, as it would seem, upon some special words giving the married woman a power to give receipts. And in *In re Clarke's Trusts* (2), where there was only a restraint of anticipation, a part of the fund which happened to be in the state of cash was ordered to be paid to a married woman.

With the greatest respect for these authorities, I think they are contrary to principle and to the decision of *Baggett* v. *Meux* (3). I might determine this case upon the narrow ground that there is not any sum of cash uninvested. But I prefer to rest my decision upon the broader view, that it was decided in *Baggett* v. *Meux* by the Lord Chancellor that a restraint upon alienation in the case of property given to a married woman absolutely for her separate use is effectual to prevent her from disposing of it during the coverture, and that, in my opinion, this rule applies, whether the restraint be expressed to be of "anticipation" or "alienation," and whether the fund or property produces income or not.

Consequently the trustees would not have been justified in paying the fund over to the married woman, and the Court cannot properly direct them to do so. It must be retained and the income paid to her during her coverture.

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(1) 8 Ch. D. 460.

(2) 21 Ch. D. 748.

(3) 1 Coll. 138, affirmed 1 Ph. 627, 628.

W. W. K.

C. A.
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From this judgment the Plaintiffs appealed. The appeal was heard on the 22nd of July, 1884.

Barber, Q.C., and *Seward Brice*, for the Appellants:—

Mrs. *O'Halloran* is entitled to receive the fund, and is able to give a good discharge for it. The case is rested by the Respondents on the ground that this was a gift of an income-bearing fund, and therefore the restraint on anticipation must have effect given to it on the authority of *In re Ellis' Trusts* (1) and *In re Clarke's Trusts* (2). But in the first-mentioned case the gift was of a sum in consols, which the Master of the Rolls held to be equivalent to a perpetual annuity and not in the nature of a gross sum of money, and that authority did not really support the decision in the other case, *In re Clarke's Trusts*, which professed to follow it. *Re Sykes' Trusts* (3) is distinguishable. In that case the fund was reversionary when the married woman attempted to charge it. *Re Sarel* (4) is of doubtful authority. *In re Croughton's Trusts* (5) is distinctly in our favour. The question must really depend upon the intention of the testator. In the present case the testatrix settled three of the shares and gave the other two absolutely, and the whole gift was reversionary till the death of *Robert Bown;* so that the clause against anticipation may have reasonable effect given to it without applying it to Mrs. *O'Halloran's* present interest, which is absolute, and has now fallen into possession. The clause giving her the power of giving receipts shews that the testatrix contemplated the fund being paid to her. The word "interest" in the clause restraining anticipation may have been used as equivalent to "income."

P. S. Gregory, for the trustees, referred to *In re Benton* (6).

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(1) Law Rep. 17 Eq. 409.

(2) 21 Ch. D. 748.

(3) 2 J. & H. 415.

(4) 4 N. R. 321.

(5) 8 Ch. D. 460.

(6) 19 Ch. D. 277.

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BAGGALLAY, L.J. :—

I am of opinion that this appeal must succeed. The point in dispute has never been brought in distinct form before the Court of Appeal; but it has been discussed on several occasions in the other Courts. In my opinion the effect of the restraint on anticipation must in all these cases depend upon the intention of the testator as expressed in the will. The testatrix in this case directs a sum of £4500 to be raised, and the annual income to be paid to *Robert Bown* during his life. *Robert Bown* died in April, 1882. The testatrix then goes on to say that from and after the decease of *Robert Bown* the trustees shall pay the annual income of £1000, part of the investments of the sum of £4500, to her niece *Elizabeth Peren* during her life, and after her death shall pay and divide the said sum of £1000 and the investments thereof and the future annual income thereof unto and between the daughters of *Elizabeth Peren.* Then as to another sum of £1000, another part of the trust fund of £4500, and the annual income thereof, the trustees are to pay the income to her niece *Martha Adams* during her life, and after her death to pay and divide the same sum of £1000 and the investments in or upon which the same shall be invested, and the future annual income thereof, unto and between the children of *Martha Adams.* In both these gifts we find mention of the investments and the future annual income of the fund. Then there is a direction that as to £1000, another part of the said trust fund of £4500, the trustees should pay and divide the same unto and between the daughters of her late niece *Jessie Hayes.* Here she speaks of it as "another part of the said trust fund of £4500," and there is no mention of the investments or of the future annual income. Then follows the particular gift in question: "As to £1500, remaining part of the said trust fund of £4500, in trust for and to pay the same to my niece *Bessie O'Halloran* for her sole and separate use." Here there is no reference to the income, but the share of the trust fund is given as a distinct sum to the lady for her separate use. There is no suggestion in the will of anything but an absolute gift of the fund to her, no reference to her enjoying it in the form of annual income. Then we come to the direction that the interest which any female might take under the will should be for her sole and separate use, and without power to anticipate the same, and that her receipt alone should be a sufficient discharge. The trustees felt it their duty to refuse to pay the fund to Mrs. *O'Halloran* without the sanction of the Court, and they have the decision of Mr. Justice *Kay* that they were justified in so doing, for he has held that on the death of *Robert Bown*, Mrs. *O'Halloran* was not entitled to have the capital paid to her, and that she could not give a good discharge for it. I am unable to take the same view. I think the lady is entitled to payment of the fund. It is a gift of a sum of money, part of a reversionary fund, not the gift of a share of an income-bearing fund. In taking this view I am not deciding contrary to the decision of the late Master of the Rolls in *In re Ellis' Trusts* (1). He proceeded on the ground that a gift of a sum of consols was equivalent to a gift of a perpetual annuity. And it is consistent with the decision of Vice-Chancellor *Bacon* in *In re Croughton's Trusts* (2), where the gift was held to be equivalent to a gift of a sum of money. With respect to the third case, *In re Clarke's Trusts* (3), I am unable entirely to agree with it. So far as giving the sum of cash to the married woman, I think it was right; but I cannot agree with Lord Justice *Fry* so far as he decided that she was entitled to the proceeds of the sale of the stock in Court, because, although formerly an income-bearing fund, it had been converted into cash. It cannot make any difference that a sum of money which was at the testator's death invested on mortgage has been converted into cash. In the present case we have a gift substantially of a sum of cash, although invested at the time. Therefore I think that the period having arrived at which this lady is to become entitled to the fund, she can give a valid receipt for it, and is entitled to have it paid to her.

I think that she was restrained from charging the fund in the interval between the death of the testatrix and the death of *Bown*. During that period the restraint on anticipation was applicable.

(1) Law Rep. 17 Eq. 409.

(2) 8 Ch. D. 460.

(3) 21 Ch. D. 748.

I also wish to say that I agree with the decision in *Re Sykes' Trusts* (1).

COTTON, L.J.:—

I am of the same opinion. It has long been settled that when money is given to a woman for her separate use, inasmuch as the separate use is a creature of equity, she may be restrained from anticipating the income. *Baggett* v. *Meux* (2) decided that this applied not only to a life interest but to a separate interest given to a married woman absolutely. If you find there are directions in the will to that effect they are effectual against anticipation. In *Baggett* v. *Meux* it was held that though there is an absolute gift of a house to a married woman, if in a subsequent part of the will there is a clear direction that the devisee is only to receive the rents from time to time during her coverture and not by way of anticipation, there the devisee takes the house absolutely, but is precluded from charging the income by anticipation during her coverture. But then some unfortunate expressions have been used by Judges making this distinction, that where there is a gift of an income-bearing fund the restraint on anticipation is effectual, but that it is not effectual if it is a gift of a sum of cash. I think that distinction is erroneous. According to the judgment of Mr. Justice *Fry* in *In re Clarke's Trusts* (3), it depends on the accident whether at the time the money is in cash or is invested. I think that is erroneous. In my opinion, the question depends upon the intention of the testator declared in his will. Has he declared an intention that the money should be paid to her, or that the income should be paid to her from time to time ? It is not enough that it should be an income-bearing fund, but the intention of the testator must be shewn that the married woman is to have the enjoyment of it in the way of income. In that case the words restraining anticipation must have their effect given to them. That is the true rule, which does not turn on the accident as to how the money is invested at the death of the testator, or at any other time. If the testator shews that the married woman is to enjoy the gift not as a mere money fund, but as an annuity, that is a strong intimation of his intention that he means the restraint on anticipation to apply not only to the income but also to the capital. In the present case, therefore, it is not material whether the gift was of a sum of cash or of a share of an invested fund, because the testatrix gives it to the trustees upon trust to pay it to Mrs. *O'Halloran* absolutely. There is no indication of an intention that the trustees should retain the investments in their hands and let her enjoy the income, but they are to pay the fund to her for her sole and separate use, and her receipt is to be a sufficient discharge.

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(1) 2 J. & H. 415.

(2) 1 Ph. 627.

(3) 21 Ch. D. 748.

In this will, having regard to the fact that it is a reversionary gift, the words restraining anticipation may have full effect given to them, by preventing the lady from charging the fund before it falls into possession. But now that the time has come for her to receive it, I am of opinion that there is nothing in the restraint against anticipation which can prevent her from claiming payment of the fund, and giving a good discharge for it.

I think, therefore, that the appeal must be allowed.

LINDLEY, L.J. :—

The question in this case cannot be answered simply by inquiring whether the fund is cash or an income-bearing fund, and by saying that if it is the latter the lady cannot have the capital. We must look at the intention of the testatrix, whether she has indicated an intention that the trustees are to keep the fund and pay the married woman the income. In this will a life interest is first given to *R. Bown*, and then the testatrix divides the fund into four parts; she settles two of them and does not settle the other two. This particular fund she gives to Mrs. *O'Halloran* for her separate use, in words in which a clear distinction is drawn between the settled and unsettled shares. The clause restraining anticipation is applicable to the shares of all the married women, not to Mrs. *O'Halloran* alone. Mr. *Brice* suggested that the "interest" for which she is to give a binding discharge is equivalent to "income." I do not think it can have that meaning, for the word "income" occurs again and again in the will with its proper signification. "Interest" in the will

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means any interest which she may take in the fund. Then the testatrix says it is to be paid to her for her sole and separate use. Can we find in that expression an indication of an intention that the income only is to be paid to her? I think not. I do not think that the words "her receipt alone shall be a sufficient discharge" carry much weight. They apply to whatever she is entitled to receive, whether it be capital or income. But I decide upon the ground that I cannot find any intention that the trustees are to keep the fund and pay only the income to her. Therefore, I think she is entitled to be paid the capital of the fund.

Solicitors: *F. E. Paynter; Slade & Slade.*

M. W.

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May 19, 21, 22, 23, 27, 28; *June* 12, 14, 16; *July* 31.

BOSWELL *v.* COAKS.

[1881 B. 363.]

Vendor and Purchaser—Sale under the Direction of the Court—Misrepresentation by Purchaser—Suppresson of Facts by Purchaser.

The life interest of *H.* in a fund of about £300,000 was put up for sale in a suit for the administration of the estate of a testator who had purchased it. An attempted sale by auction having proved abortive, *C.*, a solicitor, and *B.*, an actuary, stated to *L. & Co.*, the solicitors who conducted the sale, that they could produce evidence as to the life of *H.* which would induce the Court to accept a less sum than the supposed value, and that they were prepared to make an offer on behalf of themselves and four others, including *H.* The negotiation proceeded, and pending the settlement of a draft contract, *B.* prepared and sent to *L. & Co.*, to be laid before the Judge, a "skeleton case," which stated that *H.* had been examined by three specified medical men on behalf of the three insurance offices of which they were the respective medical examiners, and set out their joint opinion that the insurance of the life of *H.* was very hazardous, and should not be accepted at a less addition than fifteen years to his age, and that the whole premiums should be paid within ten years. It further stated that one of the three medical men had informed *B.* that he should advise his office to decline the proposal—which was thereupon withdrawn; that another of the offices refused to insure; and that the third consented to insure for £5000 at a £12 per cent. premium. It set out separate opinions of later date by two of the three medical men which were at least as unfavourable as the joint opinion, and concluded with the statement that *H.* had not since been examined on behalf of any life office. The Judge upon these materials took the opinions of actuaries, and when their reports were brought before him *B.* urged upon him that the income was liable to be reduced to £9000 by investment in Consols, and he sanctioned an agreement for purchase at £40,000, which was about the value of the life interest if the income was taken at £9000 and the life as only insurable at a £12 per cent. premium. The sale was completed, and nine years afterwards an action was brought on behalf of the creditors of the testator to impeach it. It appeared that, at the time when the skeleton case was made out, *C.* and *B.* had in their hands a later opinion by one of the above-mentioned medical officers to the effect that a £10 per cent. premium would be the fair one, and before the contract was approved by the Judge several Scotch offices had agreed to grant, at premiums of £10 11*s.* payable for ten years, insurances for sums sufficient in the whole to cover the purchase-money, and an English office had expressed its willingness to grant an insurance for £4000 on still more favourable terms. None of these facts were mentioned in the skeleton case or disclosed to the Judge:—

Held (reversing the judgment of *Fry*, J.), that the sale must be set aside, for that *C.* and *B.* knew that the materials which they laid before the Judge to enable him to form his opinion whether the sale should be sanctioned were incomplete, and calculated to produce the false impression that the life could only be insured at £12 per cent., and that the sanction of the Judge must therefore be regarded as obtained by fraud.

A person desirous of buying property which is being sold under the direction of the Court must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses which is material to enable the Court to form a correct opinion, and he will not be held excused from so doing because the Court does not ask for further information:—

Held, that if the Scotch insurances were known to *L & Co.*, the solicitors conducting the sale (a fact which the Court considered not proved), the Defendants could not successfully contend that they were not responsible for the failure of *L. & Co.* to mention them to the Judge, for that it was the duty of *B.*, who took an active personal part in obtaining the sanction of the Judge, and who had reason to believe that the Judge did not know of them, to see that he was informed of them.

THIS was an appeal by the Plaintiffs from a decision of Mr. Justice *Fry* dismissing their action, which sought to set aside a purchase made by the Defendants, *Coaks* and *Bunyon*, in 1872, on behalf of themselves and four others, *Bailey*, *Watson*, *Cadge*, and *E. K. Harvey*, of the life interest of *E. K. Harvey* in a fund of about £300,000. This life interest had been purchased by Sir *Robert Harvey*, deceased, and formed part of his estate, which was insolvent and was being administered by the Court in suits by creditors. The sanction of the Court was obtained in the administration suits to a sale for £40,000. The present action was commenced in 1881 to impeach that sale, on the ground that the sanction of the Court had been obtained by misrepresentation and suppression of material facts, and that even if there was not such suppression or misrepresentation as would avoid the sale if made to strangers, the facts that *Coaks* was the country solicitor of the executor of Sir *R. Harvey*, that another of the purchasers was trustee in the bankruptcy of a firm in which the testator had been a partner, and another was a member of the committee of inspection in that bankruptcy, placed them in a fiduciary position, and made it incumbent upon them to disclose to the Court everything material that was within their knowledge when the sale was sanctioned. *Coaks* had previously obtained leave to bid at an attempted sale by auction, and the conduct of the sale had been committed to his *London* agents, who undertook to act independently of him. Mr. Justice *Fry* considered that this put an end to his fiduciary position, and that the other two occupied no fiduciary position as regarded the estate of Sir *R. Harvey;* that the purchasers therefore were in the position of ordinary purchasers, and that there had not been any such misrepresentation or suppression by them as would invalidate the contract. His Lordship accordingly dismissed the action (1). The facts will be found fully stated in the judgment of the Court of Appeal.

The appeal was heard on May 19th, 21st, 22nd, 23rd, 27th, 28th; June 12th, 14th, and 16th. As the Court pronounced no opinion upon the question of fiduciary relation decided by Mr. Justice *Fry*, the arguments on that head are omitted.

Cookson, Q.C., and *Langworthy*, for the Appellants:—

Mr. Justice *Fry* considered that the whole of the obligations of the purchasers were those imposed by clause 3 of the contract, and he considered that they were fulfilled. His Lordship went only on the terms of the contract, and did not, we submit, lay sufficient stress on the fact that in the dealings with the Court, by which the sanction to that contract was obtained, there was *suppressio veri* and *suggestio falsi*. The Defendant *Bunyon* prepared a skeleton statement which he laid before the Chief Clerk.

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(1) 23 Ch. D. 302.

It purported to contain the opinion of three medical men, and the result of the applications made to the offices of which they were the medical officers. There was an omission from the joint opinion of a qualifying passage, which no doubt was omitted by inadvertence, and before the omission was supplied facts had come to the knowledge of *Coaks* and *Bunyon* which made the skeleton case substantially false. Even as matters stood when it was first brought before the Chief Clerk it was misleading. The separate later opinions of two of the three medical men were given, but the separate opinion of the third, which was much more favourable to the life, was omitted. It was designedly drawn up so as to lead to the conclusion that the life could not be insured at a premium of less than £12 per cent. The *Norwich* certificates ought to have been set out instead of being briefly referred to. They were no doubt referred to, because it was considered hazardous to suppress them, but it does not appear that the Master of the Rolls, or his Chief Clerk, ever read them. Again, the statement that Mr. *Harvey* had not, since his examination by the three medical men, been examined on behalf of any insurance office, was true in spirit as well as in letter when the case was first prepared; but before the approval of the contract Mr. *Harvey* had been seen, though not formally examined, by a medical man—Mr. *Johnson*—who gave a certificate as to his state of health, which it is true was not obtained on behalf of an office, but it was obtained for the purpose of being laid before the Scotch offices, and directions were given that he should "see" Mr. *Harvey* but not "examine" him. Before the contract was approved several Scotch offices had agreed to grant insurances for amounts which, taken together, covered the whole risk, and on terms much more favourable than the terms mentioned in the medical certificates stated in the case.

Now to apply the law to these facts. We admit that it is not the duty of an ordinary purchaser to inform the vendor of circumstances, known to the purchaser but not known to the vendor, which make the estate more valuable, but if he makes any misrepresentation about those circumstances, or says anything calculated to mislead, then the contract may be rescinded: *Turner* v. *Harvey* (1).

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(1) Jac. 169.

If there is a right to rescind the contract, there is a right to set aside the conveyance after completion. Mere reticence gives no equity, but a very little in the way of misrepresentation will do so: *Walters* v. *Morgan* (1). If a statement is made, which is true when made, but, to the knowledge of the person making it, becomes untrue before completion, he is bound to retract it: *Brownlie* v. *Campbell* (2); a principle which was acted on by Lord Justice *Fry* in *Davies* v. *London and Provincial Marine Insurance Company* (3). An incomplete statement may amount to misrepresentation as laid down by Lord *Cairns* in *Peek* v. *Gurney* (4); and the like rule had been laid down in *Central Railway Company of Venezuela* v. *Kisch* (5). The case here was drawn so as, by suppression of facts, to induce the belief that the life was practically uninsurable, and Lord *Romilly* was thereby led to sanction the contract.

[Baggallay, L.J.:—Are not the statements laid before Lord *Romilly* to be treated as representations made to him by the vendors?]

No. *Bunyon* signed the statement, and was in communication with the Master of the Rolls; he was an active party in inducing the Master of the Rolls to sanction the contract.

Davey, Q.C., and *Cozens-Hardy*, Q.C., for *Coaks*:—

The Plaintiffs have remarkably shifted their ground in this case. It was at first opened in the Court below as a case of fraud and conspiracy; Mr. *Cookson* did not take that line, but relied mainly on the fiduciary relations, and now the case set up is misrepresentation. We contend that *Coaks* and *Bunyon* were free from blame, that they communicated to *Linklater & Co.* all that was material; they had no right to approach the Court except through *Linklater & Co.*, and whatever was communicated to them must be treated for the present purpose as having been communicated to the Judge, it being no part of the duty of the purchasers to bring it before him. Four charges are made—(1) Studied concealment of the Scotch insurances. These

(1) 3 D. F. & J. 718.

(2) 5 App. Cas. 925.

(3) 8 Ch. D. 469.

(4) Law Rep. 6 H. L. 377, 403.

(5) Law Rep. 2 H. L. 99.

insurances were obtained by means of medical certificates obtained by the purchasers, Mr. *Harvey* having allowed himself to be examined for the purpose. The purchasers were not bound to make these certificates common property, nor to disclose the fact that, owing to them, Scotch offices had agreed to accept the life on more favourable terms than those mentioned in the skeleton case.

[Cotton, L.J.:—The proposed purchasers lay before the Master of the Rolls the opinions of three medical men, and one acceptance and two refusals by offices, in order to induce him to allow a sale at a low price, they, at the time, having in their hands more favourable medical opinions and acceptances by insurance offices on better terms.]

It must have been in the mind of every one concerned that persons purchasing an interest of this kind would protect themselves by insurances, and it was not their duty to divulge the information which they had thus acquired for their own protection. If the Chief Clerk had asked for information about insurances, the purchasers would have had the option whether, if he insisted upon it, they would go on with the negotiation, but he did not ask for it. Then (2) it is urged that there was a suppression of the *Norwich* certificates. It was no part of the contract that they should communicate them, and if they had said nothing about them no objection could have been taken, but it was thought better to refer to them: their general effect is correctly stated, and they were handed over to *Linklater & Co.* (3) Complaint is made about the suppression of Mr. *Fuller's* separate certificate. But this certificate was placed in the hands of *Linklater & Co.* and brought before the Chief Clerk. The 4th point is, that it was misleading and untrue to say that Mr. *Harvey* had not been examined on behalf of any other office. The statement was perfectly true. A contract cannot be set aside for misrepresentation without its being shewn that somebody was misled, and there is no proof here that any one was misled. Lord *Romilly* cannot be called on that point, but his Chief Clerk might and so might Mr. *Brown*. Every presumption is to be made against a claim brought forward at so late a period as that of the

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Plaintiffs. It is not until events have shewn that the purchasers had made a good bargain that any attempt is made to impeach the sale. We say that on the present materials the Court should decide in our favour, but if not, then we ask for leave to adduce evidence that the Scotch acceptances were known to the Master of the Rolls, which we had no opportunity of doing in the Court below, as Mr. Justice *Fry* decided against the Plaintiffs on their own shewing.

[BAGGALLAY, L.J. :—We consider that it would not be right for us to decide the case upon the present materials, and then allow you to call evidence if our decision is against you. If the Defendants elect to call witnesses we will hear them.]

[It was then arranged that evidence should be adduced, and Mr. *Brown* and Mr. *Bunyon* were examined and cross-examined.]

Sir *F. Herschell*, S.G., and *Northmore Lawrence*, for the Defendant *Bunyon* :—

This action arises from the bargain having been proved by the event to have been a good one for the purchasers, and the case is prejudiced by that fact. It ought to be looked at as if we were in 1872. The relation between the parties here was the ordinary relation of vendor and purchaser. An ordinary purchaser is under no obligation to disclose circumstances in his knowledge which enhance the value of the property. If he makes any statement he must speak truly; but he need not make any. This was a property of a very speculative character. At the outset all that was known to the purchasers was known to the vendors, and the vendors knew perfectly that the purchasers had means which the vendors had not of procuring Mr. *Harvey* to submit to medical examination. The purchasers got a good bargain through want of competition, the property being practically unsaleable without the power of insuring, which could not be effected unless Mr. *Harvey* would submit to examination. As to the *Norwich* certificates, they were referred to in the case and handed over—what more could be required? It is extravagant to say that not setting them out in full is a misrepresentation for which a contract can be rescinded. The *London* medical men had them, and if the Master of the Rolls had read them they would not have weighed with him as against the opinions of the *London* medical men.

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Rigby, Q.C., and *H. B. Buckley*, for *Bailey*.

Chadwyck Healey, for *Watson*.

Stirling, for *Cadge*.

Sir *H. James*, A.G., and *W. P. Beale*, for *E. K. Harvey*.

Whitehorne, Q.C., and *W. P. Beale*, for the mortgagees.

Merewether, Q.C., and *Jacques*, for the legal personal representative of Sir *R. Harvey*.

Cookson in reply.

1884. July 31. The judgment of the Court (*Baggallay*, *Cotton*, and *Lindley*, L.JJ.) was delivered by

Baggallay, L.J.:—

This is an appeal from a judgment of Mr. Justice *Fry*, dismissing with costs an action commenced by the Appellants, in the Chancery Division, to set aside the purchase by the six first named Defendants, of certain property forming part of the personal estate of the late Sir *Robert Harvey*.

The circumstances of the case are, in several respects, of a special character.

In the first place, the purchase, so sought to be set aside, was completed under a contract dated the 13th of July, 1872, whilst the action to set it aside was not commenced until the 19th of January, 1881.

The contract was, moreover, entered into and the purchase completed, with the sanction of the then Master of the Rolls, in the course of a suit for the administration of Sir *Robert Harvey's* estate.

The property purchased was of considerable value; it consisted of the net income arising, during the life of *Edward Kerrison Harvey*, a brother of Sir *Robert Harvey*, from certain mortgages and other securities, upon which the residuary personal estate of their father, General *Harvey*, was invested. This property, to which for conciseness we will refer as "the life interest," had been acquired some years previously by Sir *Robert Harvey*, by purchase from his brother; at the time of the purchase now sought to be set aside, the capital value of the property producing the life interest was about £300,000, and the estimated net income from the then investments exceeded £13,000. Under the trusts, however, of General *Harvey's* will, the investments could be varied at the discretion of the trustees, and, if all the trust funds had been invested in Government securities, the clear income would have but slightly exceeded £9000. *Edward Kerrison Harvey*, the *cestui que vie*, had attained the age of forty-five years on the 25th of September, 1871; he is still living, and is a Defendant in the present action.

The purchase was made in the names of the Defendants *Bunyon* and *Coaks*, on behalf of themselves and the Defendants *Bailey* (who has died since the commencement of the action), *Watson*, *Cadge*, and *Harvey*; the price paid was £40,000. The purchase has proved most advantageous to the purchasers; but it must be borne in mind that the purchase of a life interest, unless the purchaser has the means of effecting an insurance upon the life of the *cestui que vie*, must of necessity be a hazardous speculation, and the speculative character of a purchase of property of this description is much increased, if the life of the *cestui que vie* is, by common repute, uninsurable by reason of the assumed state of his health, or of his refusal to submit to medical examination; on the other hand, if the life can be insured for the amount of the purchase-money, even though at an advance upon the rate for a healthy life, the purchaser is exposed to little or no risk, provided the income purchased is more than sufficient to pay the annual premium for insurance and the interest on the purchase-money. At the time when the contract for the purchase of the life interest was entered into, the life of the Defendant *Harvey* was not insurable, except at a considerable advance upon the rate payable for a healthy life.

As to the following facts there is no question.

Sir *Robert Harvey* died by his own hand on the 19th of July, 1870; at the time of his death he was a partner in the firm of *Harveys & Hudsons*, bankers at *Norwich*; his partners in the firm being two gentlemen of the name of *Kerrison*. On the 22nd of the same month, his surviving partners were adjudicated bankrupt; the Defendant *Bailey* was appointed the trustee in the bankruptcy, and the Defendant *Watson* became a member of the committee of inspection. On the 29th of July, two suits of *Lacey* v. *Hill* and *Leney* v. *Hill* were instituted in the Court of Chancery for the administration of Sir *Robert Harvey's* estate; Mr. *Samuel Secker Hill* was the sole executor and trustee of the will of Sir *Robert Harvey*, and was a defendant in both suits; he was also named as a defendant in this action but has died since its commencement. *Lacey* v. *Hill* was a suit on behalf of the separate creditors of Sir *Robert Harvey*, and *Leney* v. *Hill* on behalf of the creditors of the late firm of *Harveys & Hudsons*. On the 5th of August, 1870, a decree was made in both suits for the administration of the estate of Sir *Robert Harvey*.

The Plaintiffs in the present action are unsatisfied creditors of Sir *R. Harvey*, and of the firm of *Harveys & Hudsons*, and the action is brought by them on behalf of themselves and all other the unsatisfied creditors of Sir *Robert Harvey* and of the firm of *Harveys & Hudsons*.

On the 25th of January, 1872, an order was made, in the suits of *Lacey* v. *Hill* and *Leney* v. *Hill*, for the sale of the life interest. At the date of this order the Defendant *Coaks* was the solicitor of the Defendant *Bailey* as trustee in the bankruptcy of *Harveys & Hudsons*; he was also the solicitor of the defendant *Hill* in the suits of *Lacey* v. *Hill* and *Leney* v. *Hill*, and on the same day that the suits were instituted he gave to the defendant *Hill* an undertaking in the following terms:—

> "I undertake to hold you harmless in connection with your proving the will of the deceased, and to indemnify you from any loss, costs, or expenses in anywise arising therefrom."

The Defendant *Coaks* was also the general solicitor of the plaintiff *Lacey*, and had occasionally acted for the plaintiff *Leney*, but Messrs. *Linklater & Co.* were the solicitors on the record of the plaintiffs in both suits; they had, however, been introduced to the Plaintiffs by the Defendant *Coaks*, and there was an agreement between them and him, under which he was to share in the profits derived by them from their position as solicitors of the Plaintiffs. On the 13th of March, upon the application of the Defendant *Coaks*, leave was given to him by the Master of the Rolls to bid at the sale of the life interest, and the conduct of the sale was given to the Plaintiffs, upon the undertaking of Messrs. *Linklater & Co.*, as their solicitors, not to communicate any particulars of the sale to the Defendant *Coaks*, and to carry out the sale in all respects independently of him. The Master of the Rolls was not informed upon this occasion of the agreement as to costs, between Messrs. *Linklater & Co.* and the Defendant *Coaks*, but, on the 16th of March, Mr. *Brown*, the partner in the firm of Messrs. *Linklater & Co.*, who attended to the business of the suits, communicated the particulars of the arrangement to the Master of the Rolls, and, at the same time, stated that the Defendant *Coaks* had excepted all profits arising out of the sale of the life interest from the arrangement between himself and Messrs. *Linklater & Co.*; the Master of the Rolls thereupon confirmed the leave previously given to the Defendant *Coaks* to bid at the sale, and the authority to Messrs. *Linklater & Co.* to conduct it.

The day appointed for the sale of the life interest was the 2nd of July, 1872, and it will be convenient, before proceeding to a consideration of the events of that day, to ascertain the amount of knowledge possessed, previously to that date, by Mr. *Brown*, as solicitor of the plaintiffs in the two suits, and by the intending purchasers, as to the state of the health of the Defendant *Harvey*, and the probability or possibility of insuring his life. Soon after the order had been made for the sale of the life interest Mr. *Brown* endeavoured to ascertain whether the life of the Defendant *Harvey* could be insured; he had previously received from the Defendant *Coaks* a letter, dated the 16th of February, 1872, addressed to the Defendant *Coaks* by a Mr. *Lowne*, a clerk in *Gurney's* Bank at *Norwich*, but who also acted occasionally as an insurance agent; this letter was as follows:—"In reply to your inquiry, I beg to inform you that in the year 1860, I made, on behalf of Mr. *Edward Kerrison Harvey*, proposals to the *Economic*, the *Royal Exchange*, the *Norwich Union*, the *Provident Clerks*, and other life insurance societies, for insurances on his life, and that they were declined, with but one exception, namely, the *Norwich Union*, where the life was accepted for £1000 at an increased premium, an application at the same time to increase the risk to £3000 or £4000 (I forget which) being declined."

In April of the same year Mr. *Brown* wrote to the Defendant *Harvey*, requesting an interview, to which the Defendant *Watson*, who was the solicitor of the Defendant *Harvey*, replied, to the effect that the Defendant *Harvey* did not feel called upon to be examined for the benefit of others.

In May, Mr. *Brown* visited *Norwich*, and had interviews with Mr. *Lowne*, the writer of the letter just mentioned, as to the attempted insurances in 1860, and with Mr. *Preston*, who was the solicitor of some members of the *Harvey* family, and the conclusion at which he arrived was, that it was quite impossible to insure the life of the Defendant *Harvey*, unless that gentleman would consent to be examined by the medical officers of the companies with which it might be proposed to effect insurances, and to such an examination he was led to believe that the Defendant would not consent.

In the meantime the Defendants *Bunyon* and *Coaks*, and the other Defendants who were associated with them as intending purchasers of the life interest, obtained opinions from *Norwich* medical men, as to the state of health of the Defendant *Harvey*, with the view, as they allege, of guiding them as to the price they might safely offer for the life interest, and as to the probability of their being able to insure his life. Amongst the opinions so obtained by them were those of Messrs. *Johnson*, *Eade*, and *Crosse*. They also had one from the Defendant *Cadge*, who was a surgeon in practice at *Norwich*. These opinions, which have been referred to in the course of the arguments as "the *Norwich* certificates," contained passages in the following terms; in that of Mr. *Johnson*, dated the 22nd of June, 1872,—"I consider that he is likely to live to a good old age. His form is strong and well developed.

I am not acquainted with any circumstances calculated to render an insurance on his life hazardous." In that of Mr. *Crosse*, dated the 21st of June, 1872,—"His prospects of longevity are quite as good as those of healthy persons generally are for his years." Dr. *Eade's* entered more into particulars. His certificate, which is dated the 22nd of June, 1872, concludes as follows:—"I think it possible that his life may go on increasing in strength and health, and that he may attain to a fair or even a good age. But I am also of opinion that his life can only be taken by an assurance office as of diminished and uncertain value. It is extremely difficult to estimate the proper amount by which the premium of assurance should be increased, but I will venture to suggest that in case of acceptance an addition of ten years to his age might probably be fair, or that perhaps a still more equitable bargain might be made by arranging for having the premiums paid by a few instalments maturing at an earlier date." The certificate of the Defendant *Cadge* is dated the 30th of October, 1870, nearly two years earlier, and contained the following passage:—"I consider that he has no organic disease, and know that his general health and prospects of longevity have improved of late. In my opinion his life is assurable, at some increase of the ordinary rate;" and in a letter addressed to the Defendant *Harvey*, and dated the 22nd of June, 1872, the Defendant *Cadge*, who was then an intending purchaser, wrote as follows:—"Having an interest in the purchase of your life interest, I cannot, of course, examine you medically at this time, but I think the report I made less than two years ago, when I had no thought of being interested in your life in any way, may be of use, and I therefore send you a copy of it, desiring only to add that I feel confident your health and probability of long life are now as good or even better than in October, 1870."

The certificates were received by the Defendant *Coaks* on the 23rd of June. On the following day, the Defendant *Harvey*, who had a few days previously agreed to join the combination of purchasers, came to *London*, and was examined, on the 25th, by Dr. *Pitman*, on behalf of the *London and Provincial Law Life Office*; Dr. *Fuller* on behalf of the *Law Life Office*; and Dr. *Beale*, on behalf of the *Clerical and Medical Life Office*; these three gentlemen, after examining him, gave a joint certificate, as follows:—

"We have this day examined Mr. *Edward Kerrison Harvey*, and have perused the papers submitted to us. We are of opinion that the acceptance of his life would be attended with great risk, but should the directors entertain his proposal, we recommend that he be not accepted at a less addition than fifteen years to his present age, and we consider it desirable that the premiums be paid within ten years.

"(Signed)
Henry A. Pitman, M.D.
Lionel S. Beale.
Henry W. Fuller, M.D."

It is alleged by the Defendant *Bunyon* that he called on the same day, the 25th of June, at the *London and Provincial Law Life Office*, and was informed by Dr. *Pitman* that, if the directors asked his opinion, he should recommend them not to entertain the proposal, and that he thereupon withdrew it; on the 27th of June, in reply to a proposal to the *Law Life Office* that the insurance should be for a term only, the Defendant *Bunyon* received a letter from the actuary, stating that the directors would not be disposed to entertain a proposal, either for life or for a term of years; and on the 28th of June the actuary of the *Clerical and Medical Life Office* replied to the proposal of the Defendant *Bunyon* in the following terms:—

"The board are willing to assure £5000 for the whole term of life, without profits, on Mr. *Harvey's* life, at an annual premium of £12 per cent., or a half-yearly premium of £6 5*s*."

It would thus appear that one only of the three offices was willing to assure the life, and that only at a very high rate of premium. It has been stated on behalf of the Defendants that "the *Norwich* certificates" were submitted to the three medical men on the 25th of June, and are the papers referred to in their joint opinion as having been perused by them; this may be, and probably is, the case; but the somewhat favourable views of the state of the Defendant *Harvey's* health, expressed by the *Norwich* doctors, do not appear to have influenced the *London* medical men, by whom the certificates were perused. It would appear, also, that the Defendants *Bunyon* and *Coaks* had ascertained the price at which the *Norwich Union* would assure the life of the Defendant *Harvey*, but to this we shall have occasion to refer more particularly presently. As nothing has been suggested to the contrary, we assume it to be the fact, that the information thus acquired by the intending purchasers, as to the state of the health of the Defendant *Harvey*, was not in any way, or to any extent, communicated to Mr. *Brown* previously to the day appointed for the sale of the life interest.

On the 2nd of July, 1872, the day so appointed, the life interest, which was divided in the particulars into twenty lots, each consisting of one-twentieth of the entire interest, was put up for sale at the auction mart in *London*; the entire interest was first put up in one lot, and, as there was no bidding for it in its entirety, it was afterwards put up in lots; no higher bidding than £1500 was made for any of the lots, and, this being below the reserved price, was not accepted. The reserved price for the entirety had been fixed at £60,000. The Defendants *Bunyon* and *Coaks* were present at the auction, but neither of them made any bidding, either for the whole life interest or for any of the twentieth parts.

Immediately after the attempted sale by auction, the Defendants *Bunyon* and *Coaks* had an interview with Mr. *Brown*, in the course of which they informed him that they were in a position to lay before the Court certain evidence as to the life of the Defendant *Harvey*, which would induce the Court to accept a much smaller sum than was originally believed to be the value of the life interest; that they were, in fact, in possession of the joint opinion of three *London* medical men of eminence, whose names, however, they declined to give, as to the state of health of the Defendant *Harvey*, which they had obtained with the view of taking insurances for their protection as intending purchasers at the auction; and that they were prepared to make an offer for the life interest, and to furnish the evidence which they had thus obtained, if a provisional contract could be framed, which would prevent such evidence, when furnished, being used for the purpose of effecting insurances upon the life of the Defendant *Harvey* without their concurrence; they at the same time informed Mr. *Brown* that the offer would be made on behalf of themselves and four other gentlemen, including the Defendant *Harvey*. Mr. *Brown* at once communicated this proposal to the Chief Clerk of the Master of the Rolls, who requested that it might be put in writing; and accordingly, on the same day, the Defendant *Bunyon*, with the concurrence of the Defendants *Coaks* and *Cadge*, who were present, wrote, and handed to Mr. *Brown*, a letter in the following terms:—

"50, *Fleet Street*, 2nd July, 1872.

"Dear Sirs,—I am prepared to purchase the life interest mentioned in the twenty lots put up to auction to-day by Mr. *Bull*, and will name a price, provided that it be accepted by two actuaries to be named by you, and under the light of the evidence of three medical men of eminence or standing who have examined Mr. *Harvey*. If the terms are approved I shall require to have the contract optional on my part for a week, as this is a case in which it is impossible to say what a day may bring forth.—I am, &c. "*C. J. Bunyon.*

"Messrs. *Linklater & Co.*"

The negotiation thus commenced for the purchase of the life interest, resulted in a written agreement, dated the 13th of July, 1872, which was signed on that day by the plaintiff *Lacey*, as vendor, and by the Defendants *Bunyon* and *Coaks*, as purchasers, and is the contract under which the purchase, now sought to be set aside, was eventually completed; this agreement was first brought under the consideration of the Master of the Rolls on the 10th of July, and received his final approval on the 23rd of the same month, and an order confirming it was made in the suits on the 26th of July, 1872.

When the action was tried before Mr. Justice *Fry*, the arguments were substantially confined to the fiduciary positions of the Defendant *Coaks*, as solicitor to the defendant *Hill*, and the Defendant *Bailey*, as trustee in the bankruptcy of *Harveys & Hudsons*, and the Defendant *Watson*, as a member of the committee of inspection, and it was particularly insisted, on behalf of the Plaintiffs, that the Defendant *Coaks* still retained a fiduciary position, though leave had been given to him to bid at the sale by auction, of which leave he had not availed himself, and it was to those arguments that the observations of the learned Judge, in giving judgment, were directed, though, as stated by him, it had been faintly suggested that, independently of fiduciary relationship, there was sufficient in the case to set the contract aside. This latter argument has been strongly pressed upon us by Mr. *Cookson*, and to it we will now address ourselves; we will, however, first trace the several steps by which the agreement of the 13th of July was arrived at.

The negotiations having commenced, all parties were desirous that the matter should be carried through as quickly as possible; upon the receipt of the Defendant *Bunyon's* letter of the 2nd of July, Mr. *Brown* prepared the draft of an agreement, embodying a proposal; the draft was laid before Mr. *Dart*, one of the conveyancing counsel of the Court of Chancery, and was settled by him on the 4th of July; the draft so settled was left in the Chambers of the Master of the Rolls, and a summons for leave to the Plaintiffs to enter into an agreement in that form was heard in Chambers on the 6th; certain modifications, suggested by the Chief Clerk, but not acceded to by the Defendant *Bunyon*, caused a slight delay, but, on the 10th, the draft agreement was brought under the consideration of the Master of the Rolls, and the terms of the agreement as eventually executed were approved by him on that day.

The first two clauses of the agreement so approved, provided that the price to be paid for the twenty lots together, constituting the entirety of the life interest, should be £40,000. The special features of the agreement were contained in the clauses numbered 3, 4, and 5. They were in the following terms:—

"3. The vendor shall be furnished, upon signing this agreement, with the written opinions of three medical men of eminence in their profession, as to the insurability or noninsurability of the life of Mr. *Edward Kerrison Harvey* in the particulars of sale mentioned, founded upon actual examination of the said *E. K. Harvey*, by them made in the month of June last, on behalf of insurance offices of which they are respectively the medical examiners; and also a statutory declaration by the purchasers that such medical men are the only medical men who, to the knowledge or belief of the purchasers, have since the 1st day of June last been consulted on behalf of any life insurance offices upon the question of such insurability or uninsurability."

This clause, as originally drafted, did not contain the provision for a statutory declaration, which was most properly inserted by Mr. *Dart*.

"4. Such opinions shall be submitted to his Lordship the Master of the Rolls to decide whether the said sum of £40,000 is a fit and proper sum to be accepted by the vendor for the said property; and the vendor and purchasers shall, subject as aforesaid, abide by his decision—that is to say, if he shall decide that the said sum of £40,000 is a fair and proper sum to be accepted by the vendor, the following clause No. 5, and the subsequent clauses shall thereupon come into operation; and if the said Judge shall decide that the said sum of £40,000 ought not to be accepted, then this agreement and everything hereinafter contained shall absolutely cease and determine.

"5. The purchasers may within four days (Sundays excluded), from notice of such decision being given to them, or either of them, pay to *Thomas Bull*, of No. 8, *Bucklersbury*, in the City of *London*, auctioneer, the sum of £4000 as a deposit and in part payment of the purchase-money, and upon such payment being made this contract shall become an absolute contract on the part of the vendor and purchasers respectively for the sale and purchase, at the sum of £40,000, of the said premises, lots 1 to 20 aforesaid, subject to the clauses hereinafter contained; and in case such deposit shall not be paid, then this contract shall absolutely cease and determine."

It is unnecessary to state the clauses in the agreement following the fifth.

Whilst the draft of this agreement was being settled, "a skeleton case," as it was termed by the Defendant *Bunyon*, was prepared by him, and was forwarded on the 8th of July to Mr. *Brown*, in order that it might be placed before the Master of the Rolls, and it was before him on the 10th, when he approved the agreement. It is alleged by the Defendant *Bunyon* that this "skeleton case" was submitted to the Master of the Rolls for the purpose of ascertaining whether it contained the information which the Court would require under the third clause of the agreement. But the statements in it must have been most material in influencing the decision of the Master of the Rolls as to whether he would authorize the Plaintiff to enter into the contract.

The "skeleton case" was to the effect following:—After stating that the Defendant *Harvey* had been examined in *London* by the three medical men before mentioned, it set forth, *in extenso*, the joint opinion signed on the 25th of June, but leaving blanks for the names of the insurance offices and of the medical men, and altogether omitting the qualifying words at the conclusion of the joint opinion, which suggested that the life of the Defendant *Harvey* should not be accepted at a less addition than fifteen years and that the premiums should be paid within ten years; by which omission the unfavourable report of the three medical men was deprived of its only mitigating qualification. The "skeleton case" then set forth the statement of Dr. *Beale*, that he should recommend his directors not to entertain the proposal to insure the life of the Defendant *Harvey*, the refusal of the *Law Life Office* to accept a like proposal, either for life or for a term of years; and the willingness of the *Clerical and Medical Life Office* to grant a policy for £5000 at an annual premium of 12 per cent.; it also contained further certificates of Dr. *Pitman* and Dr. *Beale*, given at later dates than those previously mentioned and at least as unfavourable. The further certificate of Dr. *Pitman* was dated the 4th of July, 1872, and was in the following terms:—"I have examined Mr. *E. K. Harvey* of *Norwich*, and find that he is afflicted with hydrocephalus, which was probably congenital. An insurance on his life under any circumstances would be exceedingly hazardous, and I consider that the remedies to which he has recourse to relieve the pains from which he occasionally suffers are such as to add still further to the risk." That of Dr. *Beale*, which was dated the 28th of June, 1872, was as follows:—"Having examined Mr. *E. K. Harvey*, it seems to me that the life is a very hazardous one, considering the bad family history, and the general state of the proposer's health. I think that if taken a very high premium should be charged." This certificate of Dr. *Beale* was addressed to Mr. *Cutcliffe*, actuary of the *Clerical and Medical Life Office*, and a copy of it was forwarded by Mr. *Cutcliffe* to the Defendant *Bunyon* on the 3rd of July, with a letter stating that "the risk was not accepted readily on the part of any of our directors, while some desire a smaller risk at a still higher premium." And after stating that the papers before mentioned as "the *Norwich* certificates" were the papers referred to in the joint opinion of the three medical men, and that they took a generally favourable view of the case, the "skeleton case" concluded in the following terms:—"Mr. *Harvey* has not since been examined on behalf of any life office." It was signed by the Defendant *Bunyon*, and dated the 8th of July, 1872. It will be observed that no further certificate from Dr. *Fuller* was referred to.

The Master of the Rolls, with the "skeleton case" before him, but not being aware of the omission from the statement in it of the joint opinion, approved of the draft agreement of the 10th of July, and returned the "skeleton case" to the Defendant *Bunyon* that the blanks might be filled up; the blanks were filled up, but the omission was not supplied, and in this partially amended form it was again placed before the Master of the Rolls on the 12th of July, and he then made the following indorsement upon it:—"After perusing the inclosed paper containing the opinion respecting Mr. *E. K. Harvey*, I am of opinion that the contract for the sale of the life interest is a proper one to be entered into. *Romilly*, M.R., 12/7/72." Although no formal order, confirming the sale, had been made, the agreement, the draft of which had been so approved by the Master of the Rolls on the 10th of July, was engrossed on the 11th, and, on the 13th, was signed and exchanged by the Plaintiff *Lacey*, as vendor, and the Defendants *Bunyon* and *Coaks* as purchasers.

On the 17th, the purchasers, in exercise of the option conferred upon them by the fifth clause of the agreement, paid the sum of £4000 to Mr. *Brown*, to be handed over to Mr. *Bull*, and they insist that the agreement of the 13th of July thereupon became an absolute contract for the sale and purchase of the life interest at the sum of £40,000.

On the same day the Chief Clerk informed Mr. *Brown* that it would be necessary to have a formal order sanctioning the sale, and, to enable him to prepare such order, handed him the partially amended case, which had been submitted to the Master of the Rolls, and had been left in his chambers on the 12th. On examining it, in connection with the joint opinion, Mr. *Brown* discovered the omission before mentioned, and informed the Defendant *Bunyon* that the agreement would not be considered binding until the attention of the Master of the Rolls had been called to the omitted portion of the opinion; this was accordingly done, and the Master of the Rolls then desired that the opinion of two actuaries should be taken upon the completed statement. Copies of the statement in its completed form were thereupon laid before Mr. *Hendricks* and Mr. *Stephenson*, two actuaries of established reputation, with the request that they would state how many years' purchase would be the proper price for the life interest. In answer, Mr. *Stephenson* stated that the proper price for the life interest would be 4·39 years' purchase, whilst Mr. *Hendricks* carried his calculation two decimal points further, and gave 4·3931 as the proper number of years' purchase. On the 23rd of July Mr. *Brown* laid the opinions of the actuaries before the Master of the Rolls, who thereupon expressed his decision that the offer of £40,000 should be accepted; and, in accordance with this decision, the order of the 26th of July, 1872, was made, confirming the agreement.

In the meantime, on the 17th of July, and upon the assumption that the agreement of the 13th had become a concluded contract, the Defendants *Bunyon* and *Coaks* made a statutory declaration, ostensibly in pursuance of the provisions of clause 3 of the agreement. This declaration was, in substance, to the effect of the case submitted to the Master of the Rolls, in its completed form, which was made an exhibit to it; and it verified the originals of the joint opinion and of the several other opinions referred to in the case, with the exception of the *Norwich* certificates.

In our opinion no exception could fairly be taken to the terms of the agreement of the 13th of July. We go further, and say that, at the time when the Master of the Rolls expressed his decision of the 23rd of July that the offer of £40,000 should be accepted, the obligations imposed upon the purchasers by the terms of the agreement had apparently been performed; every step in the proceedings to obtain the sanction of the Master of the Rolls to the purchase had been taken with the greatest regularity, with the exception of the omission from the skeleton case before referred to, and that omission had been supplied before the final decision was given. We think that, upon the materials before him, the Master of the Rolls arrived at a perfectly right conclusion.

But it has been contended, on behalf of the Appellants, that the information afforded by the skeleton case which was laid before the Master of the Rolls to enable him to decide, first, whether he ought to sanction the agreement, and secondly, whether the price offered was sufficient, was not all that the purchasers, having regard to their own information upon the subject, were bound to afford; and that the information actually afforded, though not in itself untrue, was misleading and intended to mislead, inasmuch as other information within the knowledge of the purchasers, and of which they were well aware that the Court was ignorant, and which, if known, would have led the Court to a different decision, was intentionally and carefully withheld. For the reasons which we are about to state, we think that this contention is well founded; but it will be convenient to consider, first, what was the real effect of the information actually afforded, and to what extent it influenced the Master of the Rolls in his decision.

The information actually afforded to him amounted to no more than this—that the Defendant *Harvey* had been recently examined by the medical officers of three well-known *London* life insurance offices, who had also seen the *Norwich* certificates; that two of those offices altogether declined to insure his life; and that the third had agreed to insure it to the extent of £5000, at a premium of 12 per cent. In other words, the Court was led to believe that the life was only insurable at a 12 per cent. premium, and it cannot be doubted that it was intended by the Defendants *Bunyon* and *Coaks*, that the Master of the Rolls should so understand the representation made to him by the case. The purchasers having, as will presently be mentioned, effected other insurances upon the life of the Defendant *Harvey*, at less rates than that effected with the *Clerical and Medical Society*, a correspondence took place between the Defendants *Bunyon* and *Coaks*, shortly after the completion of the purchase, as to the expediency of dropping the latter policy; and, in reply to a letter from the Defendant *Bunyon*, recommending that it should be dropped, the Defendant *Coaks*, on the 11th of December, 1872, wrote as follows:—"You must bear in mind that this is a policy to which we referred in our statement of facts as having been granted at twelve guineas per cent., and which fact, no doubt, had its influence with the Master of the Rolls, and the actuaries who pronounced an opinion upon the value of the life interest." The representation so made, if it had been honestly and truthfully made, would have afforded the Court sufficient means for judging whether the contract should be approved and whether the price offered was sufficient. Upon this representation there could be but one answer to the question submitted to the two actuaries. Given the amount of premium, the tables supplied the actuaries with the ready answer; and the approximate agreement between the number of years' purchase assigned by each actuary, shews how simple the question was which was submitted to them. The Defendant *Bunyon*, who is an actuary of considerable experience, in a letter, which is in evidence, addressed by him to the Defendant *Coaks*, under date the 6th of December, 1880, when the institution of these proceedings was threatened, stated that, at 12 per cent. and 6 per cent. interest, the life interest, valued as an annuity, was worth exactly 4·562 years' purchase, and that at 7 per cent. interest, the value in years' purchase was 4·393.

But what practical effect had this determination of the number of years' purchase upon the acceptance by the Master of the Rolls of the purchasers' offer? If the 4·39 years' purchase had been applied to the then clear income, taken at £13,000, it would have given a sum slightly exceeding £57,000 as the proper price to be paid, and this was evidently the view taken by the actuaries who, before giving their opinions as to the proper number of years' purchase, but dealing with an income of £13,000, had separately reported that £40,000 was an insufficient price; but, when the reports of the actuaries were brought under the consideration of the Master of the Rolls on the 23rd of July, it was urged upon him by the Defendant *Bunyon* that the £13,000 might possibly, if not probably, be reduced to £9000, and it was apparently upon this basis that the decision as to accepting the offer was given, £39,500 being the amount of 4·39 years' purchase of an annuity of £9000.

It may conveniently be here stated that, upon the application of the Plaintiffs to the late Master of the Rolls, Sir *George Jessel*, for leave to commence the present action, an affidavit was made by Mr. *Brown* in opposition to one in support of the application. Whilst this affidavit was in course of preparation, Mr. *Brown* was in communication with the Defendants *Bunyon* and *Coaks*, and in a letter upon the subject of the intended affidavit, addressed to him by the Defendant *Coaks*, and dated the 4th of December, 1880, is a passage in the following terms:—

"No. 3. It is most important that it should appear in your affidavit that *it was pointed out to the Master of the Rolls by Mr. Bunyon whilst the offer was under consideration* that the trust funds were estimated to amount in value to about £300,000, and that, by a change of investment by the trustees into Government stock, the income might be reduced to about £9000 a year. It is most important to shew this, because *that will explain why the late Master of the Rolls might adopt a medium view when considering the value under the actuaries' opinions* which you produced to him, and which if worked out upon £13,000 a year, would have brought the value much higher than the sum the Court determined to take. It is, therefore, I think, of extreme importance that this fact should appear in a separate paragraph in its proper place."

The price offered by the purchasers differed so slightly from what would be the proper price upon the basis of 12 per cent. insurance and an income of £9000, that the Master of the Rolls had no alternative but to accept the price offered by the purchasers. But I must note a further circumstance in connection with the approval expressed by the Master of the Rolls on the 10th of July. It is stated by the Defendant *Bunyon*, in the twenty-fifth paragraph of his statement of defence, that, upon that occasion, he pointed out to the Master of the Rolls that the fact of the Defendant *Harvey* having become one of the combination of intending purchasers, gave them the advantage of being able to obtain a medical examination of the Defendant *Harvey* for the purpose of insuring his life, which other purchasers would not be able to do, and that the Master of the Rolls thereupon said—"No man is obliged to insure his life for the benefit of others." It is doubtless true, as so alleged by the Defendant *Bunyon*, that, in addition to the impression produced upon the Master of the Rolls by the representation that the life of the Defendant *Harvey* could only be insured at a premium of 12 per cent., that learned Judge was further influenced by the statement of the Defendant *Bunyon*, that the combination of purchasers had the advantage of being able to insure the life of the Defendant *Harvey*, which other intending purchasers could not do. And this view has been even more strongly pressed in the arguments before us; for it has been alleged that the Defendant *Harvey* refused to be examined for any one except for the Defendant *Coaks* and those associated with him, and that this refusal on his part gave them an advantage over all other buyers, and in fact made the life interest unsaleable except to themselves. Of this alleged refusal by the Defendant *Harvey* to be examined there is no evidence whatever, except two letters written by his solicitor, the Defendant *Watson*, to Mr. *Brown*. These letters were read against the Respondents, and, in that way, became admissible for them, but neither the Defendant *Watson* nor the Defendant *Harvey* was called to prove this alleged refusal, although both or either of them might have been examined, had it been deemed expedient to call them. Though the Defendant *Harvey* was not bound to submit himself to medical examination, we should be unwilling, in the absence of proof, to assume that he would act so selfish and ungenerous a part as to decline to assist his deceased brother's creditors in realising their property to the best advantage, by submitting himself to examination, had he been requested so to do, and yet, within a very short period, to submit to a similar examination, with a view to his own pecuniary profit.

We will proceed now to consider what information, which would have assisted the Court in coming to a proper decision upon the questions under consideration by him, was possessed by the purchasers, but was not disclosed to the Court. By the case which was submitted to the Master of the Rolls on the 10th of July, the separate opinions of Drs. *Beale* and *Pitman*, two of the medical men who concurred in the joint opinion of the 25th of June, were set forth; each of these separate opinions took a very unfavourable view of the state of the Defendant *Harvey's* health, and strengthened the view that his life was only insurable at a 12 per cent. premium; but the separate opinion given by Dr. *Fuller*, who also was a party to the joint opinion, and which was more favourable, was not included, though it bore the same date as that of Dr. *Pitman*. After alluding generally to the state of the Defendant *Harvey's* health, it proceeded as follows:—

"Seeing that Mr. *Harvey* has learned so to manage himself as to escape headache and to enjoy better health during the last eighteen months than at any former period of his life, my impression is that a payment of 10 per cent. would prove a fair and equitable rate both to the assurers and the assured."

It is difficult to suggest any reason why the attention of the Master of the Rolls was not directed to this letter of Dr. *Fuller*, other than the fear that it might weaken the effect which the opinions of Drs. *Pitman* and *Beale* were intended to produce. The opinion of Dr. *Fuller* was given in a letter addressed to Mr. *Davies*, the actuary of the *Law Life Office*, and it has been urged in argument that it did not reach the hands of the Defendant *Bunyon* before he had finished the skeleton case. If this were so, he had abundant opportunity at a later period of placing it before the Master of the Rolls; but as early as the 3rd of July the Defendant *Bunyon* was expecting this opinion, for in a letter to the Defendant *Coaks* on that day he writes—

"I have seen Dr. *Beale*, who turns out to be a friend of mine, and who has written a certificate which I shall have through Mr. *Cutcliffe*. I shall get the same thing from Dr. *Pitman* through Mr. *Hardy*, and no doubt the same from Dr. *Fuller* through Mr. *Davies*."

Again, it is admitted that insurances to a large amount were effected by the purchasers on the life of the Defendant *Harvey* in the months of July and August, 1872, with various insurance offices in *Scotland* and *England*, and that these insurances were effected at premiums of £10 11*s*. per cent. payable for ten years only. On the 25th of June, 1872, the same day that the joint opinion of Drs. *Pitman*, *Beale*, and *Fuller* was given, the Defendant *Bunyon* opened negotiations with Mr. *Maclagan*, the secretary of an association of life insurance offices in *Edinburgh*, known as *The Under Average Association*, with a view to effecting insurances on the life of the Defendant *Harvey*. It is unnecessary to enter into the details of these negotiations; it is sufficient to say that by a letter, dated the 1st of July, 1872, Mr. *Maclagan* informed the Defendant *Bunyon* that the association had that day resolved to recommend to the respective boards to take a sum on the Defendant *Harvey's* life as a whole-term risk, without profits, by limited payments of £13 14*s*. per cent. for seven years, or £10 11*s*. per cent. for ten years; that it rested with the boards to say what sums they would take; that on the 5th of July the Defendant *Bunyon* wrote to the Defendant *Coaks* that he had acceptances from five Scotch offices for £10,000, which, with the *Clerical and Medical* for £5000, and £4000 with the *Norwich Union*, would make £19,000; that on the same date Mr. *Maclagan* forwarded to the Defendant *Bunyon* further acceptances from Scotch offices to the amount of £10,000; that, in the aggregate, insurances were effected sufficient to cover the full price agreed to be given for the life interest; and that, with the exception of the policy with the *Clerical and Medical*, the insurances were effected at the rate of £10 11*s*. per cent. for ten years. It is, moreover, evident from the correspondence between Sir *Samuel Bignold*, the secretary of the *Norwich Union*, and the Defendants *Bunyon* and *Coaks*, that the latter, who was a director of the office, had ascertained, previously to the 2nd of July, that the *Norwich Union* would grant a policy of £4000 upon even less terms than those accepted by the Scotch offices. At this time Sir *S. Bignold* contemplated becoming a member of the combination, in the event of a purchase at the auction. The Defendant *Bunyon* was the actuary of the *Norwich Union*, and a nephew of Sir *Samuel Bignold*, and in a letter addressed by Sir *Samuel*

Bignold to the Defendant *Bunyon*, under date the 3rd of July, 1872, after stating that he had that morning had a note from the Defendant *Coaks* to the effect that the life estate had not been sold at the auction on the previous day, Sir *Samuel Bignold* proceeded as follows :—"I am glad of this issue. Our board, on the application of *Coaks*, had agreed to insure *E. K. Harvey's* life for £4000 at 9 per cent., which, I suppose, will not now be required." On the same day, the Defendant *Bunyon*, in a letter to the Defendant *Coaks*, wrote—"We had agreed that the *Norwich Union* should not have the life offered until after the auction, and it may be awkward if we are pressed by *Brown* as to the terms of the acceptance of that company." It may be, as has been urged by the Defendants' counsel, that there was no actual acceptance of the proposal; but it is clear that, at the time of the auction, the Defendants *Bunyon* and *Coaks* well knew that, if required, they could have a policy upon the terms mentioned. And there can be no doubt that this was the "£4000 with the *Norwich Union*" referred to in the letter from the Defendant *Bunyon* to the Defendant *Coaks* of the 5th of July.

The letter of Mr. *Maclagan* of the 1st of July would, in due course of post, reach the Defendant *Bunyon* before the attempted sale by auction; and, at any rate, the Defendants *Bunyon* and *Coaks* were well aware, before the skeleton case was laid before the Master of the Rolls on the 10th of July, that the life of the Defendant *Harvey* could be insured at the rate mentioned in Mr. *Maclagan's* letter of the 1st of July.

It was alleged on behalf of the purchasing Defendants that the acceptances by the Scotch offices, upon the terms mentioned in Mr. *Maclagan's* letter, were communicated to the Master of the Rolls, and were taken into consideration by him before he finally approved the sale. Had such been the case, though there would have been a manifest impropriety in placing the case before the Judge without any reference to acceptances and therefore in a form calculated to mislead, the Court would not have felt justified in setting aside the sale under circumstances so special as those of the present case. But no evidence to this effect was given on the trial. It appeared, however, that, upon the trial, Mr. Justice *Fry* took a view of the case favourable to the

Defendants, and it was urged before us that they had evidence which they did not then produce. We accordingly deemed it right, at the close of the Appellants' case, to intimate to the Respondents' counsel that, upon the materials before us, we felt that there was a case to be answered, and that they would be at liberty to adduce such evidence as they might think proper. Accordingly Mr. *Brown* and the Defendant *Bunyon* were examined after Mr. *Davey* had finished his address for the Respondent *Coaks*. It was apparently deemed unnecessary or inexpedient to examine the Defendants *Coaks, Harvey*, and *Watson*, though there was ample opportunity of doing so. With reference to the suggested communication to the Master of the Rolls of the fact of the Scotch acceptances, no direct evidence was given by Mr. *Brown;* but in his examination-in-chief he stated that in the course of a conversation with the Defendant *Coaks* on the 17th of July, he asked him how they were getting on with their insurances, telling him that he had heard from an independent source that the purchasers had got a policy from the *Pelican* office at ten guineas, and that the Defendant *Coaks* then said that the *Pelican* had followed the Scotch offices, and that he (Mr. *Brown*) gathered from the Defendant *Coaks* that they had got some insurances from the *Under Average Association of Scotland*, but that they did not go into details. This circumstantial account of the interview suggested that Mr. *Brown*, having become acquainted with the fact of the Scotch acceptances, might have mentioned them to the Master of the Rolls, though we should have felt great difficulty in coming to the conclusion that a Judge of his experience would have sanctioned such a sale, if all the materials, now suggested to have been before him, had been actually taken into consideration; but such an inference was altogether negatived, when Mr. *Cookson*, in cross-examination and in his reply, drew attention to a statement in the before-mentioned affidavit of Mr. *Brown* and to certain letters which passed between the Defendants *Bunyon* and *Coaks* in December, 1872. In the 82nd paragraph of the affidavit Mr. *Brown* stated as follows:—

"I say that I was from the 15th of March, 1872, well aware that the said *C. J. Bunyon* and *I. B. Coaks* were acting, not on their own behalf alone, but on behalf of themselves and several other persons interested with them in purchasing the said life interest; but I know nothing of the policies which are said to have been effected upon the life of the said *Edward Kerrison Harvey*."

We do not impute to Mr. *Brown* the slightest intention to mislead the Court in the evidence given by him in Court, but we attach more weight to the very carefully prepared affidavit of the 8th of December, 1880, than to his recollection upon the occasion of his recent examination; and we are satisfied that he was not made aware of the Scotch insurances at any time previously to the final approval by the Master of the Rolls of the proposed purchase; and this view is borne out by the correspondence between the Defendants *Bunyon* and *Coaks* with reference to the *Pelican* policy. The Defendant *Bunyon*, in a letter to the Defendant *Coaks*, dated the 13th of December, 1872, when urging the surrender of the *Clerical and Medical* policy, wrote: "So far from there being any representation that we could not insure except at 12 per cent., it was known by Mr. *Brown* that the *Pelican* had accepted a sum of £5000, and, if he knew that, he would have learned the rate of premium," to which the Defendant *Coaks* replied on the following day—"What Mr. *Brown* knew as to the *Pelican* policy was after the statement had gone to the Master of the Rolls."

Upon a full consideration of all the circumstances of this complicated case, we can come to no other conclusion than that the opinion of Dr. *Fuller*, the conditional arrangement with the *Norwich Union*, and the Scotch acceptances, were intentionally and carefully kept back, in order that the Master of the Rolls might remain impressed with the belief that the Defendant *Harvey's* life could not be insured at less than a 12 per cent. premium.

It has been contended, on behalf of the purchasing Defendants, that the purchase made by them was like any other purchase; that the maxims of *caveat emptor* and *caveat venditor* were as applicable to this transaction as to any ordinary case of buying and selling; and that the buyers were under no obligation to disclose the advantages they possessed to the sellers; but we cannot adopt this view; it entirely leaves out of sight the duties of persons dealing with a Court of justice. A person, desirous of buying property, which is being sold under the direction of the Court, must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material that the Court should have, to enable it to form a judgment on the subject under its consideration. But what was the course pursued by the Defendants *Bunyon* and *Coaks?* We name them alone, for they were the chief movers in the transaction; but the other members of the combination, who availed themselves of their assistance, must be equally affected by their conduct. The Defendants *Bunyon* and *Coaks* knew that the life interest was being sold under the direction of the Court, and that a contract for sale would have to be approved by Lord *Romilly;* but more than this, they had proposed, as we have before pointed out, to furnish the materials to enable Lord *Romilly* to form his opinion. They knew that the materials which they did furnish were incomplete and calculated to mislead; and they had further materials, which, if disclosed, would have given a different complexion to the case, and could hardly have failed to lead the Master of the Rolls to decline their offer.

Now, if a party to an agreement obtains the sanction of the Court by withholding information, which is material and is known to him to be so, such withholding amounts to fraud, and the agreement ought not to stand. It is no answer to say that the information given to the Court was true as far as it went, and that, if the Court desired further information or further materials, it should have asked for them. The Court is neither buyer nor seller, and it is the duty of every one laying materials before it for the purpose of obtaining its approval of any transaction, to take care that the materials furnished to guide the Court shall not be incomplete or misleading. A purchase which has received the sanction of the Court will not be set aside upon slight grounds; but, if the approval of the Court has been obtained by misrepresentation, or by the withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud and will act accordingly. The observations of Lord Justice *Turner*, in the case to which we are about to refer, are as applicable to cases similar to the present, as to that with which he was dealing. The suit of *Brooke* v. *Lord Mostyn* (1) was instituted in 1859 to set aside a compromise entered into in 1843, which had been sanctioned by the Court on behalf of an infant. It appeared that, at the time of the inquiry whether the compromise was for the benefit of the infant, a document relative to the valuation of the estate, and of a character rendering it doubtful whether the valuation which, throughout the inquiry, had been treated as correct, was not based on erroneous principles, so as to give an undervalue, was in the possession of the owners of the estate, but was not laid before the Master. The compromise was set aside, and Lord Justice *Turner*, in the course of his judgment (2), made the following observations:—"It is sufficient to say that, in my opinion, this document shews, that the materials necessary to enable a fair judgment to be formed upon the question whether this compromise was for the benefit of the infant, were not fairly and properly brought under the Master's consideration; that there was a suppression of material facts which were within the knowledge of Lord *Mostyn* and his advisers, and were not within the knowledge of the plaintiff, or of those who acted for him. It may be said, perhaps, that the Master was satisfied with the information laid before him, and called for no further information; but the question is not whether the Master called for further information, but whether the parties having this further information in their possession were justified in withholding it. I am satisfied that information was withheld which was material to have been given, and which, if given, might have altered the conclusion arrived at, and I think the fact of such information having been withheld amounts, in the eye of this Court, to fraud." The views thus expressed by Lord Justice *Turner* are, in our opinion, such as should regulate our decision upon the present appeal.

Again, it has been argued, and the point ought not to be passed over, that the purchasers gave to the Master of the Rolls all the information which the contract required. But this contract was one which could not be made without the sanction of the Court, and the first question is, how was that sanction obtained? By submitting the case to the Master of the Rolls, with the draft agreement, the Defendants were trying to induce him to approve and sanction the contract, and, in so doing, impliedly represented that the case shewed the terms on which it might be expected that insurances could be effected. Independently of any such implied representations, it was the duty of those who came for the sanction of the Court to state fairly the evidence in their possession as to the facts. In our opinion, the Defendant *Bunyon* deceived the Court by laying the case before it, when he knew, and had in his possession evidence proving, that insurances could be effected on much easier terms, and the other purchasing Defendants are affected by his knowledge. And, even if the facts had been, as alleged by the Defendants, that Mr. *Brown* was informed of the Scotch insurances, we could not assent to the contention on their behalf, that they ought not to be held responsible for any failure on his part to communicate the information to the Master of the Rolls. The Defendant *Bunyon*, on his own shewing, as before pointed out, took an active personal part in inducing the Master of the Rolls to give his sanction to the contract upon the insufficient materials before him, and must have been well aware, or, at at any rate, had very good reason to believe, that the Master of the Rolls had no information, either through Mr. *Brown*, or from any other source, upon the subject of the Scotch insurances; and it was the duty of the Defendant to see that full information upon the subject was afforded, and, if necessary, to supply any omission in that respect upon the part of Mr. *Brown*.

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(1) 2 D. J. & S. 373.

(2) 2 D. J. & S. 422.

It has also been contended on behalf of the purchasers that, having regard to the time which has elapsed since the purchase which it is now sought to set aside, was completed, the Court should not interfere. To this the answer is, that, when the Court is asked to set aside a concluded transaction, on the ground of fraud on the part of those against whom relief is sought, and especially when the fraud has been practised upon the Court itself, the mere lapse of time is no bar to the relief prayed. It may happen that there has been such an amount of laches on the part of those seeking relief that the Court may be of opinion that more injustice would be, upon the whole, done by granting than by refusing relief; but we can find no trace of any such laches in the present case. As to much of the materials upon which the Appellants rely, and upon which, in our opinion, they are entitled to succeed, information has apparently been for the first time obtained by them by the proceedings in the action. This remark particularly applies to the production of the very voluminous correspondence which has been put in evidence, without which the cleverly contrived, and for the time cleverly executed, scheme of the Defendants could not have been detected and exposed. The Plaintiffs represent a large body of creditors, and it is more difficult to hold that a class has, by delay, forfeited its rights, than that an individual has done so; moreover, in the present case there are circumstances to excuse the delay. The proper person to question the transaction was the defendant *Hill*, the executor of Sir *Robert Harvey*, or if he failed to do so, one of the plaintiffs in the suits of *Lacey* v. *Hill*, and *Leney* v. *Hill;* but the Defendant *Coaks* was the solicitor of the defendant *Hill* in both suits, and though he was not acting in the suits for either of the plaintiffs, he was the general solicitor of the plaintiff *Lacey*, and had occasionally acted for the plaintiff *Leney*, and the order of the 9th of December, 1880, giving leave to the present Plaintiffs to commence this action was made upon the refusal of the defendant *Hill* to institute proceedings. Moreover, the grounds on which we principally rely for setting aside the contract, are the concealment from the Master of the Rolls of material evidence within the knowledge of the purchasers, that is, a misrepresentation to the Judge who sanctioned the contract; and it would be very difficult for any person, not a party to the action, to ascertain whether any such concealment or misrepresentation had taken place. But there may be cases in which, though the delay may be fairly attributable to want of knowledge on the part of the plaintiffs of facts which have been ascertained by means of the action, yet, in consequence of the prejudice to the defendants arising from the delay, the Court might refuse relief, which, if sought promptly, would have been granted. In the present case, though it is not one in which relief should be refused, the Court may, and in our opinion ought, to prevent the Defendants suffering any loss for the time which has elapsed since the contract; and for this purpose the Defendants ought, in taking the accounts, to be allowed all payments made for premiums on the policies and for interest on money borrowed to pay for the purchase, and ought to have repaid to them with interest the sums paid out of their own moneys for the purchase, and to be relieved from liability for the sums borrowed for the purpose and still remaining due from them.

Having arrived at the conclusion that the purchase must be set aside upon the grounds which we have stated, we deem it unnecessary to enter into a consideration of the alleged fiduciary position of the Defendant *Coaks* towards the estate of Sir *Robert Harvey*, which was the substantial question discussed before Mr. Justice *Fry*.

The Lord Justice *Baggallay* then stated that the Court had sketched out minutes of the order to be made, which might be spoken to on a future day if there was any ground for modifying them by reason of any circumstances with which the Court was not acquainted, but no attempt must be made to depart from the principles on which they were framed. The order in substance would be as follows :—

Discharge the order of the Court below. Declare that the contract dated the 13th of July, and the order of the 26th of July, 1872, confirming the same, were obtained by misrepresentation and concealment of facts, and are void against the Plaintiffs and all other the unsatisfied creditors of Sir *Robert Harvey*, and of *Harveys & Hudsons*; and that the assignment of the life interest of *E. K. Harvey*, dated the 1st of August, 1872, ought to be set aside, subject to the mortgage thereof to the *Norwich Union* of the 6th of November, 1872. Declare that the legal personal representatives of Sir *R. Harvey* are entitled to redeem the said mortgage, and, subject thereto, are entitled to the benefit of the said life interest as part of his assets from the 1st of August, 1872, and to the benefit of any policies assigned to the said *Norwich Union*. Declare that the Defendants *Coaks*, *Bunyon*, *Watson*, *Cadge*, and *Harvey*, and the estate of *Bailey*, are entitled to be indemnified out of the life interest against their liability under the mortgage to the *Norwich Union*. Direct an account of what is due from the Defendants *Coaks*, *Bunyon*, *Watson*, *Cadge*, *Harvey*, and the estate of *Bailey*, in respect of the income of the said life interest; but, in taking such account, an allowance is to be made to them for premiums paid on policies on the life of *E. K. Harvey* assigned to the *Norwich Union*, and for interest at 4 per cent. on the £10,000, part of the purchase-money of £40,000, and let the balance be certified. Declare that the Defendants *Coaks*, *Bunyon*, *Watson*, *Cadge*, *Harvey*, and the estate of *Bailey*, are severally liable to pay such balance, in the proportion in which they have respectively divided such balance between themselves, to the legal personal representatives of the said Sir *Robert Harvey* with simple interest at 4 per cent. on the yearly balances. [Lord Justice *Baggallay* here said that if this had been an order to set aside a recent transaction the proper form of the order would have been, to have made the Defendants generally responsible for all moneys received. But having regard to the length of time which had elapsed, the Court did not desire to press the matter too hard against the several Defendants, and therefore proposed to make each Defendant responsible only for the amount he had received.] Declare that the said Defendants are entitled to be allowed in account the moneys they have respectively advanced in respect of the £10,000 part of the purchase-money. Direct an inquiry what sums have been received by the said Defendants and *Bailey* respectively in respect of the said life interest, and what is due from them respectively having regard to the aforesaid declaration, and order *Coaks*, *Bunyon*, *Watson*, *Cadge* and *Harvey* respectively to pay what shall be found due from them respectively to the legal personal representatives of Sir *R. Harvey*. Declare that the estate of the late Defendant *Bailey* is liable to pay to the legal personal representatives of Sir *R. Harvey* the amount received by *Bailey* in respect of his share of the life interest with interest at 4 per cent. Usual account against the Defendants the executors of *Bailey* if assets are not admitted. Order the Defendants *Coaks*, *Bunyon*, *Watson*, *Cadge*, and *Harvey*, and *Bailey's* executors out of his assets, to pay the costs of the Plaintiffs and of the Defendant *Grant* of the action and the appeal. [His Lordship added that the Court had not considered it necessary to deal with the question of any separate insurances effected by the purchasers for their own protection, unless desired by the parties to do so.]

Cookson, on the part of the Plaintiffs, asked whether, as regarded the costs of the action, the order would not be jointly and severally against the Defendants.

Baggallay, L.J.:—Jointly and severally as regards the costs.

Solicitors for Plaintiffs: *Whites, Renard, & Co.*

Solicitors for Defendants: *Johnson & Master; Smythe & Brettell; G. F. Hudson, Matthews, & Co.; S. W. Johnson & Son; Aldridge, Thorne, & Morris; Blake & Heseltine; W. Sturt.*

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WALKER *v.* HIRSCH.

[1884 W. 2031.]

Partnership—Participation in Profit and Loss—Injunction—Receiver.

Although an agreement for participation in profit and loss is *primâ facie* evidence of a partnership between the contracting parties as between themselves, yet the question of partnership must in all cases depend upon the intention of the parties as it appears on the contract.

By an agreement between the Plaintiff and the firm of *H. & Co.*, the members of which were the two Defendants, it was agreed that for the part taken by the Plaintiff in the business, he should receive a fixed salary of £180, and in addition should receive one eighth share of the net profits, and bear one eighth share of the losses, as shewn by the books when balanced; and the Plaintiff agreed to advance £1500 to the business. The agreement was to be determined on four months' notice on either side. The Plaintiff had been previously a clerk to the Defendants, and he continued to perform similar duties after the execution of the agreement, and was not introduced to the customers as a member of the firm, and did not sign the name of the firm to bills. The Defendants being dissatisfied with the Plaintiff gave him notice to determine the agreement, and excluded him from the place of business. The Plaintiff brought an action for winding up the partnership, and moved for an injunction and receiver. *Pearson*, J., refused the motion, on the terms of the Defendants paying £1500 into Court:—

Held, by the Court of Appeal (affirming the order of *Pearson*, J.), that on the true construction of this agreement the Plaintiff was in the position of a servant, and that there was no such partnership between the Plaintiff and the Defendants as to entitle the Plaintiff to an injunction or receiver.

Pawsey v. *Armstrong* (1) questioned.

On the 22nd of June, 1883, an agreement was signed between the Plaintiff, *Henry Faure Walker*, and the Defendants, *C. Hirsch* and *E. F. Bernhard*, who carried on business as tea and general merchants under the firm of *Hirsch, Fulde, & Co.*, as follows:—

"For the part taken by the undersigned *H. F. Walker* in the business of tea and general merchants now carried on at 118, *Fenchurch Street*, Messrs. *Hirsch, Fulde, & Co.* agree to pay him a fixed salary of £180 per annum, payable monthly. In addition *H. F. Walker* is to receive one eighth share of the net profits of the said business and to bear one eighth share of the losses thereof, as shewn by the books when balanced.

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(1) 18 Ch. D. 698.

"*H. F. Walker* agrees to leave with the said business £1500, which is not to be withdrawn by him during the continuance of this agreement, and in the meantime interest thereon at £5 per cent. per annum, payable quarterly, is to be paid to him. This agreement is to continue in force until the expiration of four months, after notice in writing on either side, and at the expiration of such notice the said sum of £1500, with any arrear of interest thereon, of salary and profits apportioned to that date, shall be paid to *H. Faure Walker*, but Messrs. *Hirsch, Fulde, & Co.* shall be at liberty to repay the £1500 to *H. Faure Walker* on giving one month's notice in writing.

"*H. Faure Walker* also agrees that he will during the continuance of this agreement, if desired by Messrs. *Hirsch, Fulde, & Co.*, leave in the business one quarter of his said share of profits, the money as left to be added to the £1500, to bear interest and to be repayable in the same manner. This agreement to come into force on the 1st of July next. Dated this 22nd of June, 1883.

Hirsch, Fulde, & Co.
H. Faure Walker."

Before the execution of the agreement the Plaintiff had been acting as general clerk to the Defendants, at a salary of £70 a year. The Plaintiff advanced the £1500 as agreed. The name of the firm was not altered, and no mention of the Plaintiff was made in any of the trade circulars or bills of the firm, nor was he introduced as a partner to the bankers or any of the customers of the firm. He never signed any bills of exchange for the firm, and when he signed any letter or receipt for the firm he signed in his own name, "for *Hirsch, Fulde, & Co.*"

The Defendants, not being satisfied with the conduct of the Plaintiff, on the 1st of May, 1884, gave him written notice to determine the agreement at the end of four months, and shortly afterwards they excluded him from the office.

On the 12th of June, 1884, the Plaintiff brought the present action against the Defendants, asking for a winding-up of the partnership entered into by the agreement, an injunction restraining

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the Defendants from excluding him from the partnership, and an injunction restraining the Defendants from dealing with the partnership assets, and for a receiver and manager.

The Plaintiff then moved for an injunction and receiver.

On the 13th of June Mr. Justice *Pearson*, without deciding whether there was a partnership between the Plaintiff and the Defendants, made an order refusing the injunction and receiver, the Defendants to pay £1500 into Court.

From this order, so far as it refused the injunction and receiver, the Plaintiff appealed.

Higgins, Q.C., and *Jason Smith*, for the Appellant:—

The agreement between the parties constituted a partnership between them. The participation in losses and profits has always been considered a conclusive test of a partnership, not only as against strangers, but as between the contracting parties: *Lindley* on Partnership (1); *Pooley* v. *Driver* (2). And in *Pawsey* v. *Armstrong* (3) Mr. Justice *Kay* said: "I confess, in my opinion, the agreement to share profit and loss is quite conclusive of the relation between two persons who do so agree, and it is not possible for one of them afterwards to say, 'I was not a partner,' any more than it would be possible for a man and woman who had gone through the formal ceremony of marriage before a registrar, and had satisfied all the conditions of the law for making a valid marriage, to say that they were not man and wife, because at the same time one had said to the other, 'Now mind, we are not man and wife.'" On the other hand, it is not necessary that a partner should have any interest in the stock-in-trade. It is true that the Plaintiff did not accept bills in the name of the firm, but such an arrangement between partners is not unusual. Until the four months have expired the Plaintiff is liable for the losses of the business, and he has moreover a right to have his £1500 which he advanced secured. He is therefore entitled to an injunction and receiver.

Cookson, Q.C., and *Northmore Lawrence*, for the Defendants:—

We do not deny that the Plaintiff would be held to be a partner as against third parties, but the question of partnership *inter se* must depend on the intention of the parties, to be gathered from the agreement and from their conduct: *Smith* v. *Watson* (1); *Syers* v. *Syers* (2). The Plaintiff was a servant of the firm before the agreement, and it is clear from the agreement that he was intended to remain in the same position and perform the same duties as before, but with an additional remuneration. The Defendants had a right to exclude him at any time. The £1500 was a mere debt to the Plaintiff; and now that that sum has been secured by being paid into Court, he has no interest whatever in the partnership assets or accounts.

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(1) 4th Ed. p. 18. (2) 5 Ch. D. 458. (3) 18 Ch. D. 698, 704.

Higgins, in reply.

BAGGALLAY, L.J.:—

I am of opinion that we can derive no assistance in this case from the definitions or attempted definitions of the words "partners," and "partnership," in the various text-books; and although we may gather general principles from reported cases having reference to partners and partnerships, I do not see that, so far as regards the particular case we have to deal with, we can gain any assistance from those authorities.

It appears to me that the question here is, what was the interest conferred upon the Plaintiff *Walker* by the agreement which was entered into between him and Messrs. *Hirsch, Fulde, & Co.* on the 22nd of June, 1883. Now it appears that Messrs. *Hirsch, Fulde, & Co.* carried on business as merchants abroad, and also in *London* for some time previously to that date. Different arrangements had been made as regards the residence of the particular partners, and apparently more importance was to be given for the future to the concern as carried on in *London*; and then this agreement was entered into. Now, although this agreement has been read several times, I must, to make my meaning clear, refer to it in its several paragraphs, which are not very long; and, in the first place, I may note that this document is not signed by *A.*, *B.*, and *C.*, three persons, which is the usual form when *A.*, *B.*, and *C.* enter into a partnership; but it is signed by one party, *Walker*, and it is not signed by the other two parties individually, but it is signed in the name of the partnership of *Hirsch, Fulde, & Co.*, which was composed of the other two parties: it is a contract between an existing firm on the one hand and an individual on the other. Then it begins: "For the part taken by the undersigned, *Henry Faure Walker*, in the business of tea and general merchants." As I read the contract, he was to continue to be an employé of the business; and in consideration of the services so rendered by him he was to receive from *Hirsch, Fulde, & Co.*—from the firm—a fixed salary, payable in a particular manner. It goes on: "In addition, *H. Faure Walker* is to receive an eighth share of the net profits of the said business, and to bear one-eighth share of the losses thereof, as shewn by the books when balanced." That is to say, if it stood there, in addition to the £180 per annum, he was to be credited with one-eighth share of the profits of the said business—that is, of the business of *Hirsch, Fulde, & Co.*—at the same time agreeing to be debited with one-eighth share of the losses, if any, in respect of the said business. It is generally expected that a business will yield a profit, and it was supposed to be an addition to the salary, and at the same time it was coupled with the condition that he was to bear one-eighth share of the losses. I can well understand that in most cases where there is an agreement with reference to a particular business and the particular parties entering into it that they shall share the profits, and bear the losses, in certain proportions, of carrying on the business, with nothing to explain or get rid of those words, that would certainly be *primâ facie* evidence of an intention to carry on business in partnership. But, again, I say it must depend upon the general terms of the agreement. I can well understand an agreement simply making this provision amounting to a partnership between the persons, but here you have to take it in connection with the fact that it is evidently an addition to the salary that he is to receive, that he is to have one-eighth of the profit and bear one-eighth of the losses. Now, if that provision as to a share in profits and losses was to create a partnership, one would expect to find some provision as far as regards the assets of the business and the goodwill of the business. You would hardly expect

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(1) 2 B. & C. 401.

(2) 1 App. Cas. 174.

(unless there were a provision upon that point) a partnership to be created this way, which would give to the party, entering into it without having been into it before, a right to determine the partnership, and thereupon to share in its assets and goodwill. But it does not rest there. "*Walker* agrees to leave with the said business £1500, which is not to be withdrawn by him during the continuance of this agreement." That is to say, one of the considerations upon which the firm engaged him at this salary, together with this possible addition to his salary, is that he lends to the firm—I look upon it in that light—£1500. Then the agreement goes on: "and in the meantime interest thereon at 5 per cent. per annum, payable quarterly, is to be paid to him." It is a very common provision in articles of partnership, where a particular partner advances more than his proportion of the capital, that he should be allowed in priority to other payments out of the assets of the partnership interest upon the sum so advanced. However, this is apparently—at least I so read it—a simple loan or agreement to lend to the company this sum of money, and I think that is borne out by what follows: "This agreement is to continue in force until the expiration of four months' notice in writing on either side." That appears to me to be inconsistent with the idea of a partnership between the three partners in the full complete sense in which partnership has been alleged to have existed on the part of the Plaintiff, namely, that he could have given that four months' notice directly afterwards without having contributed one penny to the capital or in any way assisted in acquiring the goodwill—that he was to have the power of winding up the whole and taking his share. It appears to me to negative the idea that there was any intention to create a general partnership as has been alleged on the part of the Plaintiff. Then the whole arrangement is to be determined on four months' notice, at the expiration of which the said sum of £1500, with any arrear of interest thereon of salary and profits apportioned to that date was to be paid to *Walker*. He is to have back the money he has lent as the consideration for his engagement, and to have any balance of salary or of the profits by which his salary was to be augmented. But Messrs. *Hirsch, Fulde, & Co.*

shall be at liberty to repay the £1500 to *H. Faure Walker* "on giving one month's notice in writing." There the parties who are to repay are the two gentlemen, *Hirsch, Fulde, & Co.*, described by their company name. They are the persons who are to repay, and *Walker* is the person who is to receive it back. Again, it appears to me that this is inconsistent with the notion of any general partnership. Then there is a further provision, which I do not think affects the construction, that *Walker* also agrees that he will, during the continuance of this agreement, if desired by Messrs. *Hirsch, Fulde, & Co.*, leave in the business one quarter of his share of profits, the money so left to be added to the £1500, to bear interest, and to be repayable in the same manner—not by way of capital, but by way of addition to the £1500 loan, which was to carry interest in the same way as the £1500 loan. It appears to me that we have only to look at the agreement to see that there is no general partnership created such as that which the Appellant contends for.

But no doubt there is in a sense a kind of partnership created —a kind of joint interest or adventure provided for, namely, that during the time that he is in this service as clerk, manager, or whatever else it may be, he is to have a certain fixed proportion of the profits and losses. Then it is suggested that to a certain extent there was an arrangement by virtue of which he is to have a share, and in that sense, and in that sense only, is there a partnership of a very limited or qualified character as between the Plaintiff and the Defendants. That is, however, very different from what has been urged of a general partnership existing here between the three.

But, then, what right does that limited interest give him? I at one time thought that if the Defendants were improperly dealing with the assets, if they were improperly preventing him from examining into and watching over and guarding against any improper application of the assets of the company, if I could trace in the agreement anything like a provision that the conduct of the business was to be in any way under his control, then the fact that he had such control would be an incident to be taken into consideration in dealing with the question whether he should be excluded or not. For that reason I was

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desirous of hearing the argument for the Defendants upon that part of the case. But I am satisfied, now that we have got all the materials and substantial facts before us, that there was no such understanding, nor can I see any trace whatever of any such arrangement by him while he was employed in the service of the firm as to justify application to the Court to restrain the Defendants from doing what *primâ facie* they have a right to do, to exclude one of their servants from taking an active part in the management of the business.

There was a suggestion that possibly this £1500 might be in danger, but all difficulty of that kind seems to have been removed, because the learned Judge, Mr. Justice *Pearson*, has directed, I suppose, without any objection raised on the part of the Defendants, that the £1500 should be, and it has been, brought into Court. That sum, therefore, has been made safe—the £1500 is no longer at risk or at hazard, and under these circumstances it appears to me that the Plaintiff has not made out that case which justifies him in asking the only injunction to which I though it possible he might be entitled, namely, an injunction to restrain the Defendants from excluding him from the place of business.

COTTON, L.J. :—

This is an application by way of appeal from Mr. Justice *Pearson*, and the motion asks for a receiver and an injunction. The two questions as to receivership and injunction stand on somewhat different grounds. As to the receivership, I understand the Plaintiff asks for a receiver to receive and take into his control the assets of the partnership for the purpose of asserting his rights at the expiration of four months to a share of those assets including the goodwill. As regards the injunction, he claims to restrain the Defendants from excluding him from taking a share in the management of the business of *Hirsch, Fulde, & Co.*, and it was argued in this way: that this document, which was signed in a way which I will mention presently, constitutes a partnership between these parties. Now, as in very many cases, a great deal of argument arises from considering what is meant by a word which includes various things. The contention here must be that there is a partnership as between the parties. Now of course different questions arise when the question is as between third parties and a man alleged to be, though he says he is not, a member of the partnership. There the question generally, almost always, is whether a man is liable on a contract not entered into by himself, nor under any express authority given by him, but alleged by the plaintiff to have been entered into under an implied authority given by one of the parties to another to transact all matters of business relating to the partnership and to bind his partners by any contract entered into with reference to it. It is a question really whether what the defendant in fact had done had made the person who actually entered into the contract his agent for the purpose of entering into that particular contract.

Very different questions arise when we come to the question which exists here, whether the parties are between themselves partners. I have used the word "partners," but really what we have to consider when we are considering questions as between the parties themselves, and not as between strangers and one of the parties or all of them, is really this: What rights had the contract entered into in fact given one of the parties against the other? And that is the whole question when the matter arises as between those who are alleged to be—I will use now the ambiguous term—"partners." Therefore what we really have to consider is this, what on the contract between the parties are the rights which that contract has *inter se* given to one as against the other.

Here as regards the application for a receiver, it was said that the Plaintiff is a partner, and that, upon the footing of his being a partner, there arises a right to have on the dissolution of the partnership a sale of the assets, including the goodwill, and to have a share of the assets, and of all the profits which arise, not on the ordinary carrying on of the business on the division between the parties according to their arrangements of what they consider to be realised profits, but which may arise when the assets are sold, from the price realised by the sale exceeding that price at which they stood in the partnership books. In my opinion it is clear on the face of this agreement that this was not the agreement into which the parties entered. In the first place I am struck with this, that the agreement entered into is one not as between the three parties, the Plaintiff and the Defendants, but an agreement entered into by the firm, *Hirsch, Fulde, & Co.*, of which at the time when this agreement was entered into admittedly *Walker* was not a partner, with him as an individual. It does not say that from a certain time he shall be considered as becoming a member of the firm of *Hirsch, Fulde, & Co.*, but that *Hirsch, Fulde, & Co.*, in consideration of services rendered by him, shall pay him a salary of £180 per annum payable monthly. That to my mind so far is merely this, that the firm agree to employ a person who will not be a member of the firm and to pay him a salary of £180 per annum. Then in addition, not in alteration of, but in addition to his salary, he is to receive one-eighth share of the net profits of the business, and to bear one-eighth of the losses thereof as shewn by the books when balanced. To my mind that shews clearly that he is not to have any such rights as he now insists upon. The profit he is to have is that profit ascertained yearly, when the books are balanced, and the share of the loss, if any, which he is to bear is the loss shewn when the books are balanced, and that certainly excludes that on which the receivership application is founded, that he is to have here such rights as an ordinary partner would have to share on a dissolution, unless he is excluded by express contract, in the profits arising from the business which is carried on and to have a share in those very assets. He is excluded by the agreement saying that it is to be "profits and losses as shewn by the books when balanced."

In my opinion that disposes of the case as far as the receivership is concerned; but certain authorities were referred to, and the first one which was referred to was *Pooley* v. *Driver* (1). *Pooley* v. *Driver* was a case between the defendant and a party who insisted on a contract as binding upon the defendant, who was not a party to it, unless he authorized the person who entered into it and gave him an implied authority by being his partner to enter into contracts relating to the partnership business. That is entirely outside this case.

Then there was another case relied upon, the case of *Pawsey* v. *Armstrong* (2). Now, undoubtedly, if that case is to be considered

(1) 5 Ch. D. 458.

(2) 18 Ch. D. 698.

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as binding, it would go far to support the Plaintiff's contention, because there, as I understand, Mr. Justice *Kay* did lay down that if there was an agreement to share profits and losses, whatever the intention of the parties as expressed in the agreement might be, that of necessity imposed upon them the position of partners with the consequential right of each member of the partnership to have on the dissolution a share in the assets and the profits arising upon the sale of those assets. In my opinion, that is not right as between the parties themselves. Whether they be said to be partners in the sense of sharing profits, or anything else, you must look for the rights which they have as between themselves to the fair construction of the contract. But Mr. Justice *Kay* laid down, that if they do share profits and losses, whether they intend to be partners or not, they are partners, and, as I understand it, even if they express by their contract that they do not intend to be so. I dissent from that, and I mention it because hereafter probably it may be said, if I do not mention it, that the Court when that case was quoted, and much relied upon, did not express any dissent, and so therefore it may be assumed that the Court approved of it. Therefore I think it right to give my opinion upon that case. Mr. Justice *Kay* refers to this. He says that if two parties go before the registrar, and are married, and then say to one another we will not be husband and wife, that they would still be so. He does not appear to have remembered the Act for marriages before the registrar, 6 & 7 Will. 4, c. 85, s. 20, which requires that there shall be a solemn declaration by the parties, in which each of the parties shall say to the other, "I call upon these persons here present to witness that I, *A. B.*, take thee, *C. D.*, to be my lawful wife [*or* husband]," as the case may be. If, in making that declaration, either of them said before the registrar, "But we do not intend to be husband and wife," then there would not have been the legal ceremony of marriage provided for by the Marriage Act. If they had said that to one another secretly, either before or after the ceremony, the law is that by going through that ceremony before the registrar they are husband and wife, whatever they may have said secretly between themselves. That case of course is entirely different from this, where the question arises upon what the parties have said in the contract which they had entered into, as to which there is no positive statute defining any form as between parties. Therefore, I think that as to those two cases, though one of them might help the Plaintiff a good deal, I must express my view that I decline to follow the reasoning of that case whatever may have been the evidence as to the agreement in that case between the parties.

But now we come to what is a different matter, namely, the injunction. Here the question is not what rights the Plaintiff had in the property, but whether he had any rights at all in the control and management of the business. If he is a mere servant, having an interest in the profits and losses, with a stated salary, I know no case which would justify the Court in enforcing upon persons, whether they are carrying on business, or merely leading ordinary lives and residing in their own houses, servants whom they dislike, who, they think, will not assist them according to their mind in the conduct of their business, or in the management of their houses. But here is there anything really in the contract which gives the Plaintiff any right to interfere in the management of the business? In my opinion there is not. It is not a partnership with all the consequences flowing from that in general terms without any restriction. It is merely, in my opinion, an arrangement by the firm with an outsider, on certain terms as regards his salary. If, while this money was in the business, they were going to engage in some entirely different business and run a risk with the Plaintiff's money, it might be that the Court would interfere to restrain them from misapplying the assets—that is to say, from applying the assets in a business not contemplated, and a business which according to the contract they did not propose to carry on. But that is an entirely different thing from forcing them to allow the Plaintiff to have a control in the management of the business of *Hirsch, Fulde, & Co.*, which, if he were a partner, with all the rights incident to that position, undoubtedly he would have. But if he is a servant he cannot do that unless there is some special contract that he is to have that right. If he is a servant, I do not say that if such a contract were made the Court would interfere. That point may arise some day hereafter, and it is quite sufficient here to say that, in my opinion, between these parties they did not contract that the Plaintiff was to have any right to interfere in the management and control of the business; but he took his chance that these gentlemen would make as large profits as they could, and not incur any losses which they could avoid, and therefore, in my opinion, there is no ground for asking the Court to interfere in the mode proposed by injunction to prevent these gentlemen from excluding from their place of business—and I suppose it is asked from the management of the concern—this person who by his contract has got no such rights.

LINDLEY, L.J.:—

This case is interesting, and not altogether free from difficulty, but it is not to be decided by the short cut suggested by the Appellant. It is not to be decided for or against the Appellant merely by saying that because there is in this document a clause which gives him a right to share in the profits and losses, therefore he is a partner, and has all the rights of a partner, except so far as the contract has excluded those rights; that is a method of dealing with the case which appears to me entirely erroneous. The question is, what is the true construction of this document and what are the rights of the parties arising from it? Now the document is not a mere contract of loan; it is not a mere contract of service; it is not a mere contract of partnership. It has some of the elements of all those contracts. The Plaintiff has lent money, he is in some respects a servant, he is to the extent of sharing in profits and losses in the position of a partner, but not of a partner with all those rights which are contended to flow from that position. His rights as regards the profits and losses are very peculiar. The agreement is not that he shall share profits and losses; the agreement is, that he is to be paid a salary and in addition one-eighth of the net profits and to bear one-eighth of the losses thereof, as shewn by the books when balanced. The truth is, that this agreement is a complicated one, and what we have to consider is, what are the rights of the Plaintiff under it. Now what he wants is this, he says: "I am entitled to a receiver of the profits of this business, and I am entitled to an injunction to restrain the Defendants

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from excluding me from the management of it, or taking any share in the management of it." It appears to me that he is entitled to neither one nor the other. As regards his money that is safe. The £1500 which he leaves in the business and which is a loan, but not a mere loan, is safe, made safe to him by the order of Mr. Justice *Pearson*. He does not want a receiver on that account in any way. Then the bargain is, not that the partnership is dissolved when a moment's notice is given, but from four months after the expiration of the so-called agreement or partnership—call it which you will—I would rather not use the word "partnership" but "agreement." The agreement, such as it is, is terminated; but there is no case proved which would justify us in appointing a receiver, and that part of the case seems so clear that we stopped the Respondent upon it.

It did appear to me at one time that there might be a right on the part of the Plaintiff to an injunction against the Defendants restraining them from excluding him from taking that part in the management of the business to which he was entitled, but we must look into that matter a little more, and see what kind of management he is entitled to take. Now it is quite obvious when we look at this agreement, and when we know what he has done, that he is not entitled to control the Defendants in the management of the business. They are the managing partners, he has nothing to do with it except so far as his services as servant or clerk are concerned. Passing by for the moment his interest in the profits and losses, so far as management, so far as services are concerned, he is in the position of a servant not in the position of a partner having an equal voice or control in the management of the concern. Therefore we are asked to restrain the Defendants from excluding him from performing the duties of a servant. Well I do not think he is entitled to that, and it follows, therefore, that this appeal must be dismissed and of course with costs.

As regards the case of *Pawsey* v. *Armstrong* (1) I have not examined it with care, and I do not wish, therefore, to say anything about it. Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words; their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered.

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(1) 18 Ch. D. 698.

Solicitors: *Loxley & Morley; W. A. Crump & Son.*

M. W.

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GRIFFITH *v.* BLAKE.

[1884 G. 644.]

Interlocutory Injunction—Undertaking as to Damages.

Per Baggallay, Cotton, and *Lindley,* L.JJ., where an interlocutory injunction has been granted on the usual undertaking as to damages, if it afterwards is established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, though the plaintiff was not guilty of misrepresentation, suppression, or other default in obtaining the injunction.

Dictum of *Jessel,* M.R., in *Smith* v. *Day* (1) dissented from.

THIS was an appeal by the Defendants from an interim injunction granted by Mr. Justice *Chitty* to restrain the Defendants from carrying on their business so as to occasion a nuisance by noise to the Plaintiffs.

The Plaintiffs were solicitors, and occupied as offices the ground floor of a newly erected building in the *Station Approach, Cardiff.* A few months after they had taken possession, the Defendants, who were ironmongers and tinplate workers, became, about the end of 1882, occupiers of an adjoining house, which they used for the purposes of their trade. The present action was commenced on the 20th of March, 1884, the ground of complaint being that the Defendants carried on processes which caused such noise and vibration in the Plaintiffs' offices as materially to interfere with the carrying on of the Plaintiffs' business. The Defendants, it appeared, had given a notice to quit, which would expire in July, 1884.

The Plaintiffs on the 9th of May moved for an injunction before Mr. Justice *Chitty,* and his Lordship said that the Court ought not to grant the injunction unless it was reasonably satisfied that the Plaintiffs' case would be sustained at the trial, and that it might turn out when the witnesses were seen that the facts would assume a different complexion; but the Court must decide on the evidence now before it. His Lordship then examined the evidence, and stated his conclusion to be, that there was noise created by the Defendants' operations to that degree which the law considered to be a nuisance. His Lordship, therefore, granted an injunction, the Plaintiffs undertaking to abide by any order the Court might make as to damages, in case the Court should thereafter be of opinion that the Defendants had sustained any by reason of the order, which the Plaintiffs ought to pay.

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(1) 21 Ch. D. 421.

The Defendants appealed, and the appeal was heard on the 2nd of July, 1884.

Seward Brice, for the Appellants:—

The uniform course of the Court has been not to grant an interlocutory injunction which will stop a going trade: *Attorney-General* v. *Charles* (1); *Eaden* v. *Firth* (2). The nuisance is not sufficient to justify an injunction, for though the doctrine that a person who comes to a nuisance cannot complain, is now exploded, regard is to be had to the character of the neighbourhood: *St. Helen's Smelting Company* v. *Tipping* (3). *Crump* v. *Lambert* (4) shews that in a case like the present an injunction might be granted at the trial if the case of nuisance from noise were made out, but the Court will not grant it on motion when it will stop a trade. Having regard to the decision in *Smith* v. *Day* (5), that the undertaking as to damages only applies where the plaintiff has acted improperly in obtaining the injunction, the undertaking will be no protection to us, if it turns out at the hearing that the injunction ought not to have been granted, but that the Plaintiffs were free from blame in obtaining it.

[COTTON, L.J.:—That was not a decision, it was an expression of opinion by the late Master of the Rolls, dissented from by myself, and not adopted by the other Judge.]

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(1) 11 W. R. 253.
(2) 1 H. & M. 573.
(3) 11 H. L. C. 642.
(4) Law Rep. 3 Eq. 409.
(5) 21 Ch. D. 421.

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Romer, Q.C., and *Beale, contrà*, were not called upon.

BAGGALLAY, L.J.:—

The question to be decided at the trial will be whether the noise caused by carrying on the Defendants' business occasions so much annoyance to the Plaintiffs as to amount in law to a nuisance. Mr. Justice *Chitty* has said that to entitle the Plaintiff to obtain an injunction now, the Court must be reasonably satisfied that he will succeed at the trial, but I should rather put it that he must make a strong *primâ facie* case that he will succeed at the trial. There is evidence on both sides as to the amount of noise, but I think that a *primâ facie* case of nuisance is made out. The Defendants were asked whether they would give an undertaking not to carry on their business in such a way as to cause a nuisance to the Plaintiffs, and they declined to give it. The effect of their giving it would not have been very different from that of an injunction, but their declining to give it does not give a favourable impression of their case. The Defendants have given notice to quit their premises, so that in a short time any inconvenience occasioned to them by the injunction will cease. This injunction was obtained by the Plaintiffs on the usual undertaking as to damages, and if it turns out that the injunction ought not to have been granted, the Defendants will get full compensation by means of the undertaking for the temporary damage they will have sustained. I cannot concur in the opinion expressed by the late Master of the Rolls in *Smith* v. *Day* (1). It was a *dictum* distinctly dissented from by the Lord Justice *Cotton* at the time, and the present Master of the Rolls declined to give any opinion on the point. I cannot adopt the view of the late Master of the Rolls. If the Defendants turn out to be right, it appears to me that they can, under the undertaking, obtain compensation for all injury sustained by them from the granting of the injunction.

COTTON, L.J.:—

I am of the same opinion. There is a conflict of evidence, and we cannot now finally decide the question whether there is a nuisance, but in my opinion the Plaintiffs have made out a *primâ facie* case. The Defendants, however, urge that the Court will not on motion stop a business. No doubt the Court is reluctant to interfere summarily with a business which is being carried on and intended to be carried on, but here the Defendants are leaving in three weeks, so that their business will only be interfered with for a short period, and if they turn out to be in the right they will get compensation under the undertaking as to damages. The Defendants refer to *Smith* v. *Day* (1) as being an authority the other way. The late Master of the Rolls there expressed an opinion that there ought not to be an inquiry as to damages unless the plaintiff had been guilty of some default in obtaining the injunction. Probably he did not mean his remarks to apply to a case like this, where, if the injunction was improperly granted, it would be not because the Judge made a mistake, but because the Plaintiffs' evidence was not true. But I am of opinion that his *dictum* is not well founded, and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary.

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(1) 21 Ch. D. 421.

LINDLEY, L.J.:—

I am of the same opinion. I think that the evidence of nuisance is strong, and that if the Plaintiffs ultimately fail, the Defendants can obtain under the undertaking full compensation for the injury done to them by the injunction. I agree with the observations of the other members of the Court on *Smith* v. *Day*. My opinion is that the undertaking applies in all cases where the Court at the hearing determines that the plaintiff is not entitled to an injunction. The *dictum* of the late Master of the Rolls is not consistent with what was done by the Court of Appeal in *Novello* v. *James* (2) and *Newby* v. *Harrison* (3).

Solicitors for Plaintiffs: *Torr & Co.*
Solicitor for Defendants: *Gibbs.*

(1) 21 Ch. D. 421.
(2) 5 D. M. & G. 876.
(3) 3 D. F. & J. 287.

H. C. J.

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In re ILLIDGE.
DAVIDSON *v.* ILLIDGE.

[1876 I. 94.]

Administration—Real Estate—Retainer by Heir-at-law—3 & 4 Will. 4, c. 104 [*Revised Ed. Statutes, vol. vii., p.* 617]—*Hinde Palmer's Act* (32 & 33 *Vict. c.* 46).

An heir-at-law or devisee has no right of retainer, either out of the proceeds of sale of real estate, or out of rents received by him, for a debt due to him on simple contract from the testator or intestate. Such right of retainer arises only where the creditor is a person liable to be sued at law for debts of the same nature owing by the testator or intestate, so that other creditors might gain priority over him if he had not a right to retain, and therefore an heir or devisee, as he cannot be sued at law for simple contract debts, has no right of retainer for them.

Semble, that notwithstanding *Hinde Palmer's Act* (32 & 33 Vict. c. 46), an heir-at-law or devisee where the estates are not charged with debts, may retain a debt to which he is entitled by specialty in which the heirs are bound.

Ferguson v. *Gibson* (1) considered.

THIS was an appeal by *J. B. Illidge*, the heir-at-law of the testator, from a decision of Mr. Justice *Chitty* (2).

The testator had devised his real estate without charging it with debts. The devisee disclaimed, and the heir-at-law took possession. The real estate was sold in this action, which was a creditor's action, and the question was, whether the heir had any right of retainer of moneys due to him from the testator out of the proceeds of the real estate, or the rents and profits received by him. Mr. Justice *Chitty* decided that he had not, and also held that, having regard to *Hinde Palmer's Act* (32 & 33 Vict. c. 46), the case would have been the same if he had been a creditor by specialty in which the heirs were bound.

The appeal was heard on the 24th and 25th of July, 1884.

Romer, Q.C., and *E. Cutler*, for the Appellant:—

Illidge is heir-at-law as well as legal personal representative. He is a simple contract creditor, and he claims a right of retainer out of the real estates descended to him. There is no direct authority on the subject, but we submit that the heir-at-law stands on the same footing as a devisee. By the 3 & 4 Wm. & M. c. 14, which was repealed and re-enacted by 11 Geo. 4 & 1 Will. 4, c. 47, the devisee was made liable to specialty debts; and it was expressly held in *Loomes* v. *Stotherd* (1) that a devisee of real estate has a right of retainer in the same way as an executor. Then the 3 & 4 Will. 4, c. 104, made real estate assets for payment of simple contract debts, and we contend that this estate gave the devisee and heir-at-law a retainer in respect of simple contract debts, subject to the priority of specialty creditors. This was followed by *Hinde Palmer's Act* (32 & 33 Vict. c. 46), which abolished the distinction between specialty and simple contract debts in the administration of assets. That did not abolish the right of retainer: *Crowder* v. *Stewart* (2); but the effect of it is that the heir and devisee have an equal right of retainer as to both kinds of debts: *Hall* v. *Macdonald* (3); *Player* v. *Foxhall* (4); *Ferguson* v. *Gibson* (5).

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(1) Law Rep. 14 Eq. 379.

(2) 24 Ch. D. 654.

Crossley, Q.C., and *Northmore Lawrence*, for the Plaintiffs:—

We represent the creditors of an insolvent estate, and deny the right of the heir to exercise a right of retainer. We rely on the effect of the statute 3 & 4 Will. 4, c. 104. That Act put descended real estates on the same footing as real estates devised in trust for payment of debts; therefore the heir is in the position of a trustee for payment of debts, and cannot have a right of retainer: *Bain* v. *Sadler* (6). Moreover, the Act makes the real estate assets to be administered in a Court of Equity, therefore the creditors must all be paid equally. Again, the right to retainer only arose from this: the person who was liable to be sued at law for the testator's debts was entitled to a debt, he could not sue himself, and therefore the law gave him the privilege of paying himself. Now an heir or devisee never could be sued at law for simple contract debts, and therefore could not have a right of retainer in respect of them. *Ferguson* v.

(1) 1 S. & S. 458.
(2) 16 Ch. D. 368.
(3) 14 Sim. 1.
(4) 1 Russ. 538.
(5) Law Rep. 14 Eq. 379.
(6) Ibid. 12 Eq. 570.

Gibson (1) related to a specialty debt, and therefore is no authority against us.

[They were then stopped by the Court.]

Cutler, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*, disallowing the claim of the heir-at-law, who was a simple contract creditor of the deceased, to retain, out of the proceeds of the real estate which he took as heir-at-law, as against the other creditors.

The question turns upon the construction of the Act 3 & 4 Will. 4, c. 104. Previously to that Act a creditor by specialty in which the heirs were bound had a right of action as against the heir and as against the devisee, but a simple contract creditor, except in the case where the deceased was a trader, had no claim against the real estate unless it was charged with debts, in which case it became equitable assets to be distributed rateably amongst all the creditors, whether by simple contract or specialty. What we have to consider is the real meaning of that Act, which is as follows: "Whereas it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force; be it therefore enacted . . . that from and after the passing of this Act when any person shall die seised of or entitled to any estate or interest in lands tenements or hereditaments corporeal or incorporeal, or other real estate, whether freehold, customaryhold or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees, of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates, was or were before the passing of this Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: Provided always, that in the administration of assets by Courts of Equity under and by virtue of this Act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them, before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands."

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(1) Law Rep. 14 Eq. 379.

Mr. Justice *Chitty* has held that this enactment excludes the claim to retainer, and we must consider on what ground the right of retainer was based. It was a right as against legal assets, and it was a right given for this reason: When the creditor was also executor he could not sue himself. Any other creditor by suing the executor might get priority by judgment obtained, and the executor, not being able to sue himself, was allowed as against the other creditors to retain.

But in the case which we have before us, what is the position of the simple contract creditor? A simple contract creditor, except under this statute, has no right at all as against the heir or as against the devisee unless the land has been charged with debts. The statute provides that the simple contract creditor shall have the same right of bringing a suit in equity against the heir or devisee as the creditor by specialty would have had. By having a judgment or decree under this statute, the simple contract creditor would not get a judgment which would give him a priority; he would only get a judgment for the benefit of all the creditors for the administration of the real estate.

Then, that being so, the ground upon which retainer is allowed is gone. A simple contract creditor cannot get a judgment giving him priority; he can only get a judgment as against the heir-at-law, which will put the Court in a position to administer the real estate for the benefit of all the creditors; and under that judgment all the simple contract creditors would rank *pari passu* among themselves. That being so, the foundation of the rule allowing retainer to the heir-at-law when he was a specialty creditor, or allowing retainer to an executor out of the personal estate, is gone. That was in order that he might not be under a disadvantage by not being able to sue himself, since if he could not retain, other creditors might have obtained priority over him by suing him.

Now, as I understand the contention on one side, it has been considered that *Mr. Hinde Palmer's Act* made a difference. In my opinion that Act makes no difference; it merely says that simple contract creditors and specialty creditors are to be paid rateably, but in my opinion (it is not necessary to decide the point here, and therefore I do not express a final opinion upon it) there is nothing in this Act which will prevent a creditor by specialty where the heirs are bound, if he be the heir-at-law, from retaining. The common law right of action given to a creditor by specialty in which the heir is bound, is not, as it seems to me, taken away; and I think that the statute, by making real estate liable to be administered by Courts of Equity, no more takes away the right of the heir to retain, than the power of Courts of Equity to administer personal estate takes away an executor's right of retainer.

I at first felt some difficulty about the decision of Vice-Chancellor *Wickens* in *Ferguson* v. *Gibson* (1), but in my opinion that decision was quite right. There an estate was devised to a mother for life, and to the daughter after her death. The Vice-Chancellor determined that the widow, who was a surety for the testator by specialty in which the heirs were bound (and if she had paid off the debt would have had a right to the benefit of the specialty), not having paid it off, could only be treated as a simple contract creditor, and had no right of retainer; but that her daughter, who was entitled as devisee in remainder (not as devisee in trust for sale or subject to a charge of debts, but a devisee for her own benefit) and was a creditor by specialty in which the heirs were bound, was entitled to retain. That, in my opinion, was quite right, upon the ground I have expressed, that in the case of a specialty creditor where the heirs are bound, the common law right of action against the heir, by which priority may be gained, is not taken away, whereas a simple contract creditor can only obtain a judgment as against the real estate for the benefit of himself and all the other creditors. *Mr. Hinde Palmer's Act* takes away the priority of creditors by specialty, but I do not see anything in it to take away the right which creditors by specialty in which the heirs were bound had to bring a common law action against the heir-at-law, nor to take away the consequent right of retainer by the heir-at-law. I agree however with Mr. Justice *Chitty* that an heir-at-law who is only a simple contract creditor has no right of retainer against the proceeds of real estate. The rents stand in the same position, as they are a part of the real estate descended to the heir-at-law and received by him.

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(1) Law Rep. 14 Eq. 379.

BAGGALLAY, L.J. :—

I agree entirely with the opinion expressed by Lord Justice *Cotton* in this case. The only doubt I felt arose from the case of *Ferguson* v. *Gibson* (1), but that case has been fully explained by Lord Justice *Cotton*, and the remarks he has made shew, I think, that that decision in no way interferes with the decision in the present case.

LINDLEY, L.J. :—

I also agree in the opinion that has been expressed, and have but little to add.

The question in this case turns upon the true meaning of the enactment in 3 & 4 Will. 4, c. 104, that real estate not charged with payment of debts "shall be assets to be administered in Courts of Equity." To ascertain what that means we must look at the law as it stood at the time of the passing of the Act. The heir could be sued at law in respect of any debt due on specialty in which the heirs were bound, and was liable to the extent of the real estate descended to him. The devisee under the Act 3 & 4 Wm. & M. c. 14, and ultimately under 11 Geo. 4 & 1 Will. 4, c. 47, stood precisely in the same position. The specialty creditor could bring an action at law under the statute against the devisee and recover up to the value of the devised estate. The devised estate was legal assets, because it could be got at by an action at law.

Now the real estate at the time when 3 & 4 Will. 4, c. 104, was passed was not assets at law in any sense for the purpose of paying simple contract creditors. This statute is a repetition, almost *totidem verbis,* of the 9th section of the Act of 11 Geo. 4 & 1 Will. 4, c. 47, omitting the words "being at the time of his death a trader within the true intent and meaning of the laws relating to bankrupts." How was the real estate to be got at by the simple contract creditor? He could not bring an action at law before the statute, neither could he bring an action at law under the statute. The statute did not make the real estate legal assets in the sense in which that expression is always used, assets which can be got at by an action at law, it was only made assets to be dealt with in a Court of Equity. Now the doctrine of retainer has always been confined to cases where the person seeking to retain was liable to be sued at law, and we are asked now to extend it to a case where he is under no such liability. We are of opinion that the decision appealed from is right.

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(1) Law Rep. 14 Eq. 379.

I will only add that the case of *Hall* v. *Macdonald* (1) is not to be relied upon as being any guide. I do not say that the decision was wrong, for I do not know the facts of the case. There is no reference to this Act of Parliament in the report, and we are not told whether the devise was in trust for sale or what the circumstances were. The decision may have been right, but the absence of facts makes it useless as an authority. In *Ferguson* v. *Gibson* (2) the right of a specialty creditor to retain out of the proceeds of real estate not charged with debts was allowed, but it was decided that a simple contract creditor had no such right.

Solicitors: *Davidson & Morriss; Tatham, Oblein, & Nash.*

(1) 14 Sim. 1.

(2) Law Rep. 14 Eq. 379.

M. W.
H. C. J.

In re CARTHEW.
In re PAULL.

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CHITTY, J.
May 28.
PEARSON, J.
May 23.
C. A.
July 30.

Taxation of Solicitor's Bill—Costs of Taxation—Offer by Solicitor to reduce the Amount—Certifying special Circumstances—6 & 7 Vict. c. 73, s. 37 [Revised Ed. Statutes, vol. ix., p. 128].

C., a solicitor, sent in to executors a bill of costs for £83, writing at the foot, " say £78," and the £78 was paid. The residuary legatee obtained an order to tax the bill, which was taxed at £66, being more than five-sixths of £78, but less than five-sixths of £83. The residuary legatee objected to certain items as excessive, and the Taxing Master considered that they were excessive; but held, that, as the executors had authorized them and admitted their liability to pay them, the residuary legatee could not have them reduced:—

Held, by *Chitty*, J., that the Taxing Master was right in allowing these items; that the bill must be treated as a bill for £78, from which less than one-sixth had been taxed off, and that the solicitor was entitled to the costs of the reference.

P., a solicitor, delivered a bill for £362, but stated that he would only claim £320, and the £320 only was entered in the cash account which he delivered to his clients. The clients obtained an order for taxation. The Taxing Master taxed the bill at £280, being more than five-sixths of £320, but less than five-sixths of £362, and certified that he had allowed the solicitor the costs of the reference, as he considered that since he had never claimed more than £320, the difference of £42 between this sum and the amount of the whole bill, ought to be deducted from the sums taxed off, thus reducing them to £40, which was less than a sixth of the sum he had claimed:—

Held, by *Pearson*, J., that the solicitor must pay the costs of the reference.

Held, on appeal, that in *C.'s Case*, the bill delivered, within the meaning of 6 & 7 Vict. c. 73, s. 37, was a bill for £83, and that, as more than one-sixth had been taxed off, the solicitor must, according to that section, pay the costs of the reference; the case not coming within the proviso giving the Court a discretion where special circumstances are certified.

Held, in *P.'s Case*, that special circumstances were certified, so as to give the Court a discretion as to the costs of the reference, but that the special circumstances were not such as to induce the Court to depart from the general rule that the costs of the reference should follow the event of the taxation, and that in this case also, more than one-sixth having been taxed off the £362, the solicitor must pay the costs of the reference.

J. B. OGILVIE, a shoemaker, in a very small way of business, died in December, 1882, leaving property of the value of less than £300. He left a will appointing two executors, who proved it. They employed Mr. *Carthew* as their solicitor about the

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executorship. He delivered to them a signed bill of costs amounting to £83 3*s.* 4*d.*; at the foot of which, above the signature, was written, "say £78." This sum of £78 the executors paid on the 19th of April, 1883.

On the 10th of May, 1883, the residuary legatee obtained on petition an order for taxation of the bill. The residuary legatee carried in various objections, one of which was to items, amounting altogether to £25 10*s.* 5*d.*, for advertisements announcing the death of the testator and advertisements for creditors. The announcements of the testator's death were inserted in the *Times, Daily Telegraph, Standard,* and a *Gravesend* paper. The advertisements for creditors were inserted once in the *Gazette,* twice in the *Times,* twice in the *Standard,* twice in the *Daily Telegraph,* twice in the *Gravesend* newspaper, and twice in a *Peckham* paper.

The residuary legatee objected to the allowance of these items, "for the reason that the deceased was a journeyman shoemaker, whose death it was not necessary to advertise in the above-mentioned papers, especially having regard to the fact that he committed suicide, that an inquest was held, and that consequently, by means of the local press and otherwise, ample publicity was given to the fact that Mr. *Ogilvie* was dead. With reference to the advertisements for claims, the objectant contends that Mr. *Carthew* has not shewn that he received specific instructions to insert the advertisements in the above-mentioned papers, and that, if he had received such instructions, it was his duty as an officer of the Court to have advised the executors, that for the purpose of protecting themselves under the statute one advertisement in the *Gazette,* and two in two local papers, would have been sufficient."

Mr. *Carthew*, by affidavit, stated that one of the executors had specifically instructed him to advertise as above, and this executor also made an affidavit, stating that he had on behalf of himself and his co-executor given Mr. *Carthew* instructions to advertise in the way he did, and that they recognised their liability to him for the costs of the advertisements, and declined to question such costs.

The Taxing Master disallowed the objection, giving as his reason, "Admitting that, having regard to the circumstances stated, these advertisements were extravagant, as they certainly were, the clients state that they gave positive instructions for them, and recognise the charges and their liability to pay them. The applicant, therefore, is not in a position to sustain this objection."

The Taxing Master certified, "the bill of fees and disbursements by the said order directed to be taxed having been laid before me, amounting to £78, I have taxed and settled the same at the sum of £66 13*s.* 4*d.*, and the said bill as taxed not being less by a sixth part than the bill as delivered, I have taxed the said *G. H. Carthew* his costs of this reference at the sum of £19 17*s.* 10*d.*" He then proceeded to find that having regard to the costs of the reference and the sums of money received and paid by Mr. *Carthew*, there remained due from the Petitioner to him £8 11*s.* 2*d.*, and that the Petitioner having carried in objections to his taxation and to his allowing Mr. *Carthew* the costs of the reference, he had in part allowed the same and in part overruled the same, for the reasons appended to the objections. The reasons so appended did not contain anything as to the costs of the reference.

The residuary legatee took out a summons to review the taxation, which was adjourned into Court, and heard by Mr. Justice *Chitty* on the 28th of May, 1884.

Badcock, for the summons:—

I object to the allowance of the charges for advertisements as excessive, for the reasons stated in the objections.

CHITTY, J.:—

Under sect. 38 the taxation must be on the same footing as if the executors were the parties applying for it, and it is a fatal objection that the executors gave specific directions for these advertisements, and have throughout recognised them as proper, and admitted their liability to pay for them.

Badcock, in support of the summons:—

Our next contention is that the costs of taxation ought to be borne by the solicitor. The amount of the bill delivered, as shewn by the items, was £83 3*s.* 4*d.*, which has been reduced on taxation to £66 3*s.* 4*d.*, so that more than a sixth has been taxed off, whereas the Taxing Master has treated it as a bill of £78, from which £11 6*s.* 8*d.* only has been deducted, and thus by some arithmetical sleight of hand less than one-sixth is said to have been taxed off. We submit, therefore, that the costs of taxation ought not to have been allowed to the solicitor.

Vernon R. Smith, contrà :—

The whole amount taxed off, as shewn by the certificate, was £11 6*s.* 8*d.*, which is less than one-sixth of £78, and the solicitor's costs of the reference were therefore rightly allowed.

CHITTY, J :—

I think the Taxing Master is right upon this point also. I put this case in the course of the argument, suppose a bill delivered by a solicitor for £100 shewing items in detail—and without giving items it would not be a bill of costs at all—and with a note by the solicitor at the foot to say that instead of £100 he will take £80. Then the parties go to taxation and the Taxing Master taxes off £20 from the £100. The result is, that the client has got no benefit at all from the taxation, and in such a case as that, although the sum of £20 is more than one-sixth part of the £100, it appears to me the costs should fall upon the party taxing. I see no difference between that case and the one which the Taxing Master had before him here, and it appears to me that in taxing the solicitor's costs he has done what is quite right.

Summons dismissed with costs.

F. G. A. W.

In re PAULL.

The executors of *John Casely* employed Mr. *Paull* as their solicitor about the administration of the estate, and he received and paid the moneys arising from it. He delivered to the executors a cash account, in which he credited himself with £41 1*s.* 3*d.* for costs of probate, and £279 15*s.* 3*d.* for his general

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bill of costs, making together £320 16*s.* 6*d.* He deposed that in March, 1881, on going through the cash account with the executors, he produced his bill of costs for probate, which amounted to £43 3*s.* 1*d.*, and his general bill of costs, which amounted to £318 16*s.* 1*d.* (making together £361 19*s.* 2*d.*), and agreed to accept the above-mentioned smaller sums in full discharge of them, and entered the smaller amounts in the cash account accordingly.

On the 1st of June, 1883, an order was made on the application of the executors that Mr. *Paull* should deliver his bill of costs, and that the bill should be taxed, and that if the bill when taxed should be less by a sixth than the bill as delivered, the Master should tax the Petitioners their costs of the reference, but if when taxed it should not be less by a sixth than the bill as delivered, then he should tax the solicitor his costs of the reference, with the usual consequential directions.

Mr. *Paull*, in obedience to the order, delivered his two bills of costs for £43 3*s.* 1*d.* and £318 16*s.* 1*d.*, making a total of £361 19*s.* 2*d.* The Taxing Master taxed off £81 3*s.* 8*d.*, which was more than one-sixth, and reduced the bill to £280 15*s.* 6*d.* The difference between this amount and the £320 16*s.* 6*d.*, being only £40 1*s.*, was considerably less than one-sixth. The Taxing Master considered that on this ground Mr. *Paull* was entitled to the costs of the reference. The executors carried in an objection to this allowance on the ground that £81 10*s.*, being more than a sixth of the bill, had been taxed off.

The Taxing Master disallowed the objection, and stated his reasons as follows:—

"In this case the solicitor stated an account with his clients, the Petitioners, and in it gave credit for a sum of £320 16*s.* 6*d.*, his costs for work done for them, but he delivered no detailed bill of costs with the account. In pursuance of an order of this Court, obtained on the application of the Petitioners, the solicitor delivered bills of costs amounting to £361 19*s.* 2*d.*, but he claimed as before £320 16*s.* 6*d.* only. I have taxed the bills of £361 19*s.* 2*d.*, and have disallowed items amounting in all to £81 3*s.* 8*d.*, and the Petitioners therefore claimed that as more than one-sixth of the bill had been disallowed they were entitled to the costs of taxation. The solicitor contended that although the bill of costs delivered in obedience to the order amounted to £361 19*s.* 2*d.* he did not claim, and has never claimed, more than £320 16*s.* 6*d.*, a sum less than the bill delivered by £41 2*s.* 8*d.*, and that in considering the amount of the allowances it was right that I should consider and give effect to this fact, and should regard the taxation as having resulted in a disallowance of £40 1*s.* only instead of £81 3*s.* 8*d.* I was of opinion that this contention was right, and that I ought not to disregard the fact that the solicitor's claim has never been £361 19*s.* 2*d.*, the amount of the bill delivered, but £320 16*s.* 6*d.* only, and that, in considering the disallowances, he was entitled to have it considered that £41 2*s.* 8*d.* had been voluntarily deducted, and should be deducted from the disallowances, so reducing them to £40 1*s.*, which is not a sixth of the amount claimed by him, and I decided that on that footing the solicitor is entitled to the costs of the taxation, not including however any costs relating to the order for delivery of the bill. I have considered the objections, and I am still of the same opinion, and I disallow the objections."

The Taxing Master, by his certificate, certified that having regard to the costs of the reference and to the sums received and paid by Mr. *Paull* on account of the Petitioners, there was due from him to them £29 15*s.* 8*d.* He went on to certify that, the Petitioners having carried in objections to his taxation of the costs of the reference, he had disallowed the same, and that his reasons for doing so would be found in answers annexed to the objections.

Mr. *Paull*, by an affidavit read on the taxation, and referred to in the certificate, deposed that he had always been content to receive the £320 16*s.* 6*d.* in discharge of his bills of costs, and had never claimed any other sum, or sought to do so.

The Petitioners took out a summons to have their objections allowed, and for an order referring it to the Taxing Master to vary his certificate accordingly.

The summons was adjourned into Court and heard by Mr. Justice *Pearson* on the 23rd of May, 1884, when his Lordship decided that the solicitor must pay the costs of the reference, observing that although he acquitted Mr. *Paull* of any such intention, it would be possible, if his contention prevailed, for solicitors to follow the precedent with the object of deterring their clients from taking proceedings for taxation.

The residuary legatee appealed from the decision in *In re Carthew*, and the solicitor appealed from the decision in *In re Paull*. The appeals were both heard on the 30th of July, 1884.

Kekewich, Q.C., and *Badcock*, for the Appellant in *In re Carthew*:—

The reference is to tax the bill of costs which has been delivered. That must mean the whole bill for £83. The "say £78" is nothing but an offer to accept £78 if the bill is paid without taxation. The solicitor, therefore, is liable to the costs of taxation, for more than one-sixth has been taxed off.

Romer, Q.C., and *Vernon R. Smith*, *contrà*:—

The question is, what was the bill signed and delivered? The signature applies as much to the £78 as to any other part of the bill. It comes to this: "My bill is £78, but I give you details shewing that I might charge £83."

[BAGGALLAY, L.J.:—Suppose a bill like this referred to taxation, and only £3 taxed off, would the solicitor be obliged to accept £78?]

Yes; he could not recede.

[COTTON, L.J.:—Suppose the solicitor reduced his bill of £83 to £78 by striking out items amounting to £5, the Taxing Master might have considered those items to be items his right to which was indisputable, in which case he would have taxed off just as much as he did.]

The question is, for what amount did the solicitor claim to hold his client liable? If the principle contended for by the Appellant be correct, then if a solicitor sent in a bill containing items amounting to £100, but stating in the same way as here that he only claimed £80, and £17 were taxed off, he would have to pay the costs of taxation, though the bill was taxed at £83, which was more than he had even asked for. This would be a most unjust result.

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Kekewich, in reply:—

The bill which a solicitor delivers must be a bill containing detailed items: *Wilkinson* v. *Smart* (1). This, therefore, cannot be treated as a bill for £78, since it does not shew how that amount is arrived at.

Byrne, for the Appellant in *In re Paull*:—

In this case the payment of the £320 16*s.* 6*d.* was made before the application to tax. The solicitor when called upon to deliver his bill under the order, cannot deliver a new bill shewing items making up the smaller amount, he can only send in the old bill which the client has seen.

[LINDLEY, L.J.:—Unless you can bring the case within the discretionary power given by sect. 37, where special circumstances are certified, I think that the detailed bill which the solicitor delivered must be taken as the bill that is to be taxed.]

The Appellant claims the benefit of that discretion, for no special form of certificate is required, and the Taxing Master here has stated the circumstances of the case in such a way that the Court can act upon them. I contend further, that under the Judicature Acts and Gen. Ord. 1883, LXV., r. 1, the Court has a discretion as to costs: *Ex parte Mercers' Company* (2); the intention of the Acts and Rules being to put all costs within the discretion of the Court, and provisions to the contrary in former Acts are overridden by them: *Garnett* v. *Bradley* (3). [*Dicks* v. *Yates* (4) was also referred to.]

[COTTON, L.J.:—I doubt whether the express direction of the Act as to the incidence of costs of taxation can be departed from except in the case where we have special circumstances certified, and are there any circumstances here which if we have a discretion should lead us to depart from the rule in the Act?]

I submit it is a sufficient special circumstance that the amount allowed on taxation exceeds five-sixths of what the solicitor claimed.

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(1) 24 W. R. 42.

(2) 10 Ch. D. 481.

(3) 3 App. Cas. 944.

(4) 18 Ch. D. 76.

Vernon R. Smith, contrà, was not called upon.

BAGGALLAY, L.J.:—

These are two appeals as to the costs of taxation of solicitors' bills. I will take first the case of *In re Carthew.*

The taxation in this case was directed under 6 & 7 Vict. c. 73, s. 38, at the instance of a third party; but we must look back to sect. 37 for the rule as to costs of taxation, which provides that "in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill making such application, or so attending, shall pay such costs." I omit for the present all notice of the proviso as to stating special circumstances.

The bill delivered was a detailed bill consisting of items amounting to £83 3*s.* 4*d.* At the foot of it was written "say £78," and the signature followed these words. There was no letter accompanying the bill, so we can only infer the intention with which those words were written. It is not necessary to come to a very positive conclusion on the point; but I should say that the words in substance mean this, "Here is my bill for £83 3*s.* 4*d.* If you will pay £78 without taxation I will accept it in full discharge. If you do not I will take what taxation gives me." The bill was taxed at £66 13*s.* 4*d.*, so that, if its amount is taken at £83 3*s.* 4*d.*, more than one-sixth was taxed off, but if taken at £78, less than one-sixth. The question is whether the amount taxed off is to be taken as taxed off a bill of £83 3*s.* 4*d.*, or off a bill of £78. The words of the statute are imperative—"If such bill, when taxed, be less by a sixth part than the bill delivered, sent, or left," and the bill delivered is the guide. There is a proviso "that such officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or Judge shall be at liberty to make thereupon any such order as such Court or Judge may think right respecting the payment of the costs of such taxation." Unless special circumstances are thus certified, the costs must follow the rule in the Act, and as no special circumstances are here certified, we must take the bill as one for £83 3*s.* 4*d.*, which has, on taxation, been reduced by more than one-sixth. I cannot take the same view of the case as Mr. Justice *Chitty* has done, and in my opinion the appeal in *Carthew's* case must be allowed.

In *In re Paull* an order was obtained under sect. 41 for taxation after payment. The bills as delivered amounted to £361 19*s.* 2*d.*, but the solicitor stated that he claimed only £320 16*s.* 6*d.*, which was £41 2*s.* 8*d.* less than the amount of the bills. He had previously delivered a cash account in which he had treated the bills as being of the lesser amount. An order for taxation after payment having been obtained, full bills were carried in and the Taxing Master disallowed £81 3*s.* 8*d.*, reducing their amount to £280 15*s.* 6*d.*, which is more than five-sixths of the £320 16*s.* 6*d.* but less than five-sixths of the £361 19*s.* 2*d.* If the matter stood there, I should say, as in *Carthew's Case*, that the bill must be taken as at the larger amount, and that it must be considered that more than a sixth has been taxed off, and that the solicitor must pay the costs of the taxation. But the proviso in sect. 37, which I have already read, and which I thought inapplicable in *Carthew's Case*, has to be considered. Speaking for myself, I think that there are special circumstances stated in the certificate which bring the case within that proviso, and relieve the Court from the strict rule imposed by the statute as to the costs of the reference. But, having come to that conclusion, I do not think that the special circumstances are of such a character as to induce the Court to depart from the ordinary rule. I think it would be exceedingly pernicious to lay down a rule which would enable a solicitor whose bill exceeded what could be allowed on taxation, to oblige his client, by a device of this kind, to have his bill taxed at a greater risk as to costs than if a bill had been delivered for the amount which the solicitor had stated his willingness to accept. I do not dissent from the remark of Mr. Justice *Pearson*, that Mr. *Paull* probably did not intend to claim anything more than he believed to be fair, but I agree with the decision that he must bear the costs.

The view we take of these cases makes it unnecessary to consider whether the Judicature Acts and the Rules place the costs of taxation in all cases within the discretion of the Court, since we are of opinion that, if we have such discretion, it ought to be exercised by following the general rule laid down in the *Solicitors Act.*

COTTON, L.J. :—

In *Carthew's Case*, the only question to be considered is, what was the bill delivered within the meaning of the enactment, that "if such bill when taxed be less by a sixth part than the bill delivered, sent or left," the solicitor shall pay the costs of the reference. In my opinion it was the bill for £83 3*s.* 4*d.* It is true that we have at the foot of that bill, "say £78." I agree with the Lord Justice *Baggallay* as to the effect of those words. There was no bill delivered shewing an amount of £78, and that sum cannot be considered as the amount of the bill delivered. More than one-sixth of the bill has therefore been taxed off. No special circumstances are certified, but if there were, as the taxation is not at the instance of the client, but of a third party, I do not see how the solicitor can avail himself of special circumstances as between himself and the client.

In *Paull's Case* I will assume that special circumstances are certified in such a way as to give us a discretion. But the order for taxation was made without imposing any special terms, and the result of taxation has been that from £361 19*s.* 2*d.* the sum of £81 3*s.* 8*d.* has been taxed off, leaving £280 15*s.* 6*d.*, which is £40 less than the sum which the solicitor received from his client. I think that if we have a discretion we ought to exercise it by making the costs follow the event as prescribed by the *Solicitors Act.*

As Lord Justice *Baggallay* has observed, the view we take of the case makes it unnecessary to decide whether the Judicature Acts and the Rules give us a discretion as to those costs.

LINDLEY, L.J.:—

In *Carthew's Case*, a bill was delivered for £83 3*s.* 4*d.*, and at the foot, before the signature, was written "say £78." The Taxing Master treated it as a bill for £78, and held that the solicitor was entitled to the costs of the reference, as, taking it at that amount, less than one-sixth had been taxed off. The first point is, was it a bill for £78? It is impossible, in my opinion, to say that it was. It was a bill containing items making up £83 3*s.* 4*d.*, with an offer to take a less sum, and it is impossible to say that the bill delivered within the meaning of the Act was a bill for £78.

In *Paull's Case* there is this important difference, that the Taxing Master certifies that he has taxed the bills as bills for the full amount of £361 19*s.* 2*d.*, and has stated his reasons for considering that the solicitor should not pay but should receive the costs of the reference. I think that he ought to be considered to have certified special circumstances, so as to give the Court a discretion under the proviso in sect. 37; but I do not think that the circumstances are such as ought to lead us to exercise our discretion otherwise than by making the costs of taxation follow the event according to the terms of the Act. The amount allowed on taxation is less by £40 than the amount which had been paid.

Solicitors in *In re Carthew: Gregory, Rowcliffes, & Co.; G. H. Carthew.*

Solicitors in *In re Paull: Peacock & Goddard; Whitakers & Woolbert.*

H. C. J.

PRESTON *v.* LUCK.

[1884 P. 1134.]

C. A.
1884
KAY, J.
June 12.
C. A.
Aug. 8.

Contract from Correspondence—Consensus ad idem—Misunderstanding of Parties as to Subject-matter of Negotiation.

A negotiation took place as to the sale by *L.* to *P.* of a British patent and certain foreign patents for the same inventions, and ultimately an offer was made for sale at £500 and accepted by letter, but it was not quite clear whether the offer and acceptance related to all the patents, or to the British patent only. *P.* brought his action for specific performance, treating the contract as including all the patents, and moved for an injunction to restrain *L.* from parting with them. At the hearing of the motion he asked for leave to amend his writ, and for an injunction as to the British patent only:—

Held, by *Kay*, J., that as *L.* had understood that he was negotiating about the British patent only, and *P.* that he was negotiating as to all the patents, there never was the *consensus ad idem* which is necessary to make a contract; that there was, therefore, no contract which *P.* could enforce; and that an injunction must be refused.

Held, on appeal, that an injunction should be granted, for that where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that the defendant did not understand it according to what the Court holds to be its true construction, the fact that the plaintiff has put an erroneous construction upon it, and insisted that it included what it did not include, does not prevent there being a contract, nor preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits to be its true construction.

IN January, 1884, the Defendant *Luck* was the patentee in *England* of an invention for "improvements in apparatus for the gelatinization or conversion of unmalted grain." He had also an interest in patents granted in several foreign countries for the same invention.

On the 25th of January, 1884, *Luck*, in reply to a letter of inquiry from the Plaintiffs, wrote: "I beg to say that the unsold patent rights consist of the sole right to sell or license to use the converting apparatus to brewers in the *United Kingdom*, or to license or prohibit any one to make the same in *England*, and also 15 per cent. of the profits of the patent or apparatus in *America, Canada, Germany, France, Belgium, India*, and one or two more places." . . . "The sum I am willing to take is £750."

On the 9th of February the Plaintiffs wrote to *Luck*: "Would you be disposed to accept £500 for your rights in the patent as enumerated in your favour of 25th ult., subject to the approval of our solicitor?"

On the 11th of February *Luck* replied: "If you will make me a decided offer by return of post or telegram of £500 for all my rights in the English patent, 'apparatus for the gelatinization or conversion of unmalted grain,' No. 3881, and will at your option pay the fees for renewal or prolongation of the patent as they fall due, I will accept such offer. I also transfer to you all my interest in the foreign patents for the same invention as enumerated in my letter dated the 25th of January." . . . "I mentioned that Captain *William Turner* had the option of purchase at a higher sum up to the 27th March. If you close with me now, of course you would occupy the same position as I now hold, and would receive any money paid by Captain *Turner* in exercising his right of purchase by the 27th March proxo."

On the 12th of February telegram from Plaintiff to *Luck*: "We do not quite understand. Has Captain *Turner* your offer for *England* as well as the Continent until March? or are you perfectly free to negotiate for *England?*" On the same day *Luck* replied by telegram: "Captain *Turner* has the option of purchase of the whole of the patents, including *England*. Option terminates March 27th." On the same day *Luck* wrote to the Plaintiffs: "A telegram from you just received, and reply sent off. I have by a written agreement given to Captain *Turner* the option of purchasing the English and foreign patents, always reserving your rights in the English patent" (the Plaintiffs were licensees) "and ditto for vinegar-making purposes in *England*, and subject to such option, I can sell all my unreserved rights as quoted by me in my last communication to you. If you decide to purchase you acquire all my rights and interests in the foreign and English patents, and take all profits derivable therefrom which would otherwise be due to me."

On the same day the Plaintiffs replied by telegram: "We cannot see any advantage to us in your offer. Had Captain

Turner no option in the English portion of the patent then we would negotiate. We do not care about the Continent. Should Captain *Turner* decide not to accept, let us know."

On the 20th of February the Plaintiffs wrote: "Please inform us if you are disposed to sell the sole use of the patent for producing saccharine in the *United Kingdom*, and for what consideration."

On the 21st of February *Luck* replied: "Since writing you last the agreement between Mr. *W. Turner* and myself has been somewhat modified, and if he does not exercise his option of purchase by the 19th of March I shall be pleased to offer the sale of my patent for conversion of raw grain to you as explained in my former letter, viz., only retaining the right to use for vinegar making. I should have written before, but was waiting to act upon the desire expressed in your last letter, *i.e.*, to write you upon learning whether Mr. *Turner* would purchase or not. My terms to sell would be the same as quoted in response to your question as to whether I would accept an offer of £500 for the patent. Terms of payment as suggested by yourselves."

On the 25th of March *Luck* wrote to the Plaintiffs: "I beg to inform you that the option of purchase vested by me in parties before named will expire on Thursday, the 27th instant, and if your intentions are unaltered, I shall have pleasure in completing the sale of my English patent for using unmalted grains (reserving, as explained in previous letters, the right to make and use the apparatus for vinegar making)." "P.S.—The terms and conditions of sale I have given in former letters after the receipt of your telegram."

On the 31st of March the Plaintiffs replied by telegram: "We accept your offer, subject to approval of our solicitors, as to your rights in patent. Please reply if this is acceptable to you," and wrote in the same terms on the same day.

On the same day *Luck* replied: "I am in receipt of your telegram, and on the terms before stated I receive your acceptance of the offer of my English patent for the conversion of unmalted grain, viz., your acceptance for £500, and you to pay stamp fees for extension of patent, or allow it to lapse at your option, I retaining the right to make and use the apparatus for vinegar making."

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The Plaintiffs at once placed the papers in the hands of their solicitors, who wrote to *Luck* to ask for particulars of the foreign and colonial patents. *Luck* replied that the Plaintiffs had not purchased them. A correspondence ensued on this subject, the Plaintiffs' solicitors throughout insisting that their clients had purchased both the British and foreign patents, and *Luck's* solicitors insisting that the agreement only extended to the British patent.

Pending this correspondence *Turner* wrote to the Plaintiffs, stating that his option to purchase was subsisting, and on the 22nd of April *Luck's* solicitors wrote to the Plaintiffs' solicitors that *Turner* had given *Luck* notice that he would purchase, and by a subsequent letter stated that as *Turner's* option had been exercised *Luck* had no power to sell to the Plaintiffs.

On the 1st of May the Plaintiffs issued their writ in this action against *Luck*, claiming specific performance of an agreement for sale to them of the English patent and of the Defendant's share and interest in the foreign patents for the same invention in *France*, *Belgium*, and other countries therein mentioned, and for an injunction to prevent *Luck* from disposing of or parting with his interest in the English and foreign patents, and for a receiver.

The Plaintiffs, on the 22nd of May, moved before Mr. Justice *Kay* for an injunction. *Luck*, by an affidavit, deposed that since the Plaintiffs' letter of the 20th of February he never intended to sell his interest in the foreign patents along with the English patent, but considered that he was negotiating for the sale of the English patent alone, and that he was advised that in consequence of the subject-matter of the alleged agreement having never been concluded between the Plaintiffs and himself, there was no binding agreement. He further stated the facts relating to *Turner*, and deposed that he was advised that he was bound to transfer his interest in the English patent to *Turner*. Leave was given to amend by making *Turner* a party, which was forthwith done, and the motion was brought on again on the 12th of June. It appeared from *Luck's* affidavit that the patent had been assigned to *Turner* for certain purposes which had failed, but he had not re-assigned it to *Luck*, so that it was at law vested in *Turner*.

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Hastings, Q.C., and *F. Thompson*, for the Plaintiffs:—

The agreement on its true construction includes the foreign patents, and that was how the Plaintiffs understood it. But if the Court is against us on that, we are content to ask an injunction in respect of the English patent only.

Robinson, Q.C., and *Lawson*, for *Luck*.

W. Pearson, Q.C., and *Ingpen*, for *Turner*.

[The cases cited are referred to in the judgment.]

KAY, J., after referring to the dealings with *Turner*, and stating the material parts of the correspondence, proceeded as follows:—

It seems to me that on the true construction of this correspondence there clearly was no contract in respect of the foreign patents.

Then it is contended on behalf of the Plaintiffs that, even if they put a wrong construction on the correspondence, they are entitled, although their writ and their notice of motion refer not merely to the English patent but to the foreign patents, to say now at the bar, "If we are wrong the Court is bound to put a construction on the correspondence, and will give us relief according to the construction it puts on it." I tried to illustrate that argument by putting an analogous case. Suppose a man sold "all that my estate in the county of so and so," which, *primâ facie*, would make a perfectly good contract, because by ascertaining what estate he had in the county, you may render certain that which on the face of the contract is uncertain, but it turned out that the parties were never at one, and that one meant one estate, and the other meant another estate, could it possibly be said that there was a contract? Or again, supposing, to put a case rather nearer to this, it was "all my field in the parish of *A.*," and there were two closes, and the plaintiff said "By 'field' I meant both closes," but the defendant said "No, the field that was meant was one of those closes alone," and the correspondence was in favour of the defendant's contention that by "field" was meant one of the closes alone, can the plaintiff come forward and say "I insist on specific performance and I insist on having both fields, and yet if the Court is of opinion that the contract means only one field, then I will insist on having one field."

A contract means *consensus ad idem.* Lord *Westbury,* than whom very few people had greater command of language, puts it thus in the case of *Chinnock* v. *Marchioness of Ely* (1): "An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus,* what may have been written or said becomes immaterial." If I may respectfully say so, I concur in every word of that definition, and think it as good a definition of contract as I know of. It is plain to my mind that in this case there never was any *consensus.* If the Plaintiffs' evidence is to be believed, and I do not wish for a moment to cast any discredit upon it, the Plaintiffs understood that they were bargaining for the English and foreign patents; the Defendant *Luck* understood (and as it seems to me with very much more reason, because that I hold to be the construction of these letters) that he was contracting to sell not the foreign patents but the English patent only. How is it possible for the Plaintiffs to say that there was a *consensus?*

Reliance is placed on some words of Lord *Eldon,* which seem to me to be entirely misapplied. In *Kennedy* v. *Lee* (2) Lord *Eldon* said (and that was a case of correspondence from which a contract was sought to be made out), "The Court will, in all such cases, regard, not the form of the agreement, but the substance, whether or not, in point of fact, such an agreement has been entered into." Then he goes on thus, "It must be understood, however, that the party seeking specific performance of such an agreement, is bound to find in the correspondence, not merely a treaty—still less, a proposal—for an agreement; but a treaty, with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party, but of both. It follows that he is bound to point out to the Court upon the face of the correspondence, a clear description of the subject-matter, relative

(1) 4 D. J. & S. 638, 643.

(2) 3 Mer. 441, 450.

to which the contract was in fact made and entered into." Then come the words on which comment has been made, "I do not mean (because the cases which have been decided would not bear me out in going so far), that I am to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition which, be it what it may, *de facto* arises out of the terms of the correspondence." It is clear that by those words Lord *Eldon* meant nothing more than this, that if there is written evidence of a contract, and the meaning on the face of it is quite plain, a party cannot defend himself by saying "I did not mean precisely that, I meant something a little different." If the words used are words which, if you read them with a mind desirous of understanding them, are intelligible, a slight difference or a slight mistake will not prevent there being a contract, but where a mistake goes to the greater part of the subject-matter, as here the whole interest in these foreign patents numbering ten, you cannot say that it is a slight mistake. The Plaintiffs come here saying, "We understood this contract to be not for the English patent alone, but for ten foreign patents into the bargain, and we claim all those ten patents." If the Court should hold that to be a claim which the written evidence of the agreement does not warrant, it is impossible for the Plaintiffs at the bar to fall back on that which is the true construction of the agreement, and say "There is a contract between us for that lesser thing which up to this moment we have utterly repudiated."

There is another reason why it seems to me impossible that the Plaintiffs should succeed. Suppose this contract were ambiguous, it is settled by a series of cases, one of the last of which is *Tamplin* v. *James* (1), that where there is a mistake contributed to by the plaintiff, it is impossible that the plaintiff can obtain specific performance. Now, if there was a mistake here, whose fault was it? I do not think there was any mistake on the part of *Luck*; but if there had been, the fault of that mistake is absolutely the Plaintiffs' own, because, after having said "We do not want to have anything to do with the foreign patents," they commence a new negotiation for the

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(1) 15 Ch. D. 215.

English patent only, and I cannot conceive anything more likely to mislead as to what the intention of the Plaintiffs was than the telegram and the later letters which I have read. Therefore, even if I thought that this correspondence could be construed according to the Plaintiffs' view, I should say that the mistake on the part of *Luck* would have been contributed to, if not induced or caused by, the telegram and letters of the Plaintiffs, which pointed to a negotiation for the English patent only. It is said that hereafter there may be an amendment. The Plaintiffs may make such amendment as they like, but certainly I shall deal with this matter before me now on the footing of the case which they have set up in their affidavits, and by the indorsement on their writ, and by their notice of motion. I hold that that case fails entirely, and I therefore refuse this motion with costs.

Hastings, Q.C.:—Your Lordship understood me as asking for liberty to amend my writ at the present moment, and pray in the alternative?

KAY, J.:—Quite so.

C. A.

The Plaintiffs appealed, and the appeal was heard on the 8th of August, 1884.

Hastings, Q.C., and *F. Thompson*, for the Plaintiffs.

Robinson, Q.C., and *Lawson*, for *Luck*.

W. Pearson, Q.C., and *Ingpen*, for *Turner*.

BAGGALLAY, L.J.:—

This is an appeal against the refusal of Mr. Justice *Kay* to grant an injunction restraining the dealing with or assigning certain letters patent. Were it not for the great experience of the learned Judge, who heard this case at considerable length, and came to the conclusion that the application to him should be refused, I should have thought it very clear that an interim injunction ought to be granted. I intend to go as little into the circumstances of the case as possible; but at the same time I must to some extent refer to them for the purpose of explaining my reasons for arriving at that conclusion. [His Lordship then shortly stated the facts, and proceeded as follows:—]

Mr. Justice *Kay's* view of the case appears to have been that there was a correspondence of such a nature as, on the face of it, would amount to a contract; but that, inasmuch as Mr. *Luck* only considered himself to be selling the English patents, and the Plaintiffs considered that they were buying both the English and foreign patents, there had not been that *consensus ad idem* which is necessary to make a binding contract between the parties, and that therefore the Plaintiffs had not got a contract which they could enforce. With all respect to Mr. Justice *Kay*, I think he was in error in proceeding upon that ground, because, after the affidavit of Mr. *Luck* had been put in, and when the matter was before the learned Judge for his decision, the Plaintiff waived all claim to an injunction as to the foreign patents, and adopting the view of the Defendant, Mr. *Luck*, that the agreement had reference to the English patent only, he was prepared to ask for an injunction restraining dealing with the English patent alone. Now, so far as the matter rested on the ground on which the learned Judge proceeded, it appears to me that the proper course to have pursued would have been to have allowed an amendment of the writ, so as to limit the action to the alleged sale of the English patent, and then to have granted an injunction restraining parting with that patent until the hearing of the action.

[His Lordship then went into the part of the case relating to Captain *Turner's* alleged right of pre-emption, and stated his view to be that there was a grave question to be decided at the hearing, and that until then matters ought to be kept *in statu quo.*]

COTTON, L.J.:—

I am of the same opinion. This is an application only for an interlocutory injunction, the object of which is to to keep things *in statu quo*, so that, if at the hearing the Plaintiffs obtain a judgment in their favour, the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual. Of course, in order to entitle the Plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally on the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the Plaintiffs are entitled to relief. I shall express no final opinion on the question whether there was a concluded contract between the Plaintiffs and *Luck*. It may be that when the letters are scanned more narrowly and critically there is no concluded agreement, but my present impression is that there was an offer and an acceptance, though, as is very often the case when a contract has to be made out from letters, the case is not perfectly plain. But what Mr. Justice *Kay* decided was this, that as the Plaintiffs came here contending that what they were to buy, and the Defendant *Luck* was to sell, were the English and the foreign patents, and the letters on which the contract is sought to be made out referred only in his Lordship's opinion to the English patent, there was no *consensus ad idem* which is essential to a contract. Now, where parties enter into a written contract, what they have agreed to must depend on the construction of that contract. It is very true that in some cases, if the party against whom specific performance is sought to be obtained, satisfies the Court by clear evidence that what he on the terms of the contract appears to have contracted for was not in his mind the thing in respect of which he was bargaining, the Court will refuse specific performance, but that is only because in cases of specific performance the Court does not grant that special equitable relief if it finds, for any reason, that it would be what is called a hardship or unreasonable to compel the defendant specifically to perform the contract. If here the position of the parties were reversed, and the present Plaintiffs could satisfy the Court that although upon the true construction of these letters the English patent alone was the subject of the agreement, they never intended to offer £500 for the English patent alone, but for the English and foreign patents together, the Court would probably refuse specific performance against them. But if the letters themselves make a concluded agreement in writing, then, in my opinion, the mere fact that down to the time when the parties were before Mr. Justice *Kay*, the Plaintiffs were contending that on the true construction of those letters they included something more than he has now decided they did include, is no reason for saying that there is not any agreement enforceable in equity against the Defendant, who says that from the very first he intended this to be a contract for the British patent. If the Plaintiffs were to bring their action to a hearing, asking for specific performance of the agreement for an assignment of the English and foreign patents, and the Court decided that they were entitled only to take the English patent, they might say—Then we will have our action dismissed. But the Plaintiffs are ready to amend their writ and confine the relief asked to a specific performance of the contract as regards the English patent. That, in my opinion, if we grant an injunction, they ought to undertake to do, but the mere fact that they put an erroneous construction on a contract in writing existing between them and the Defendant *Luck*, and insisted that it included what it does not in fact include, is, in my opinion, no ground for saying that there is no contract. As the motion was refused on that ground it is our duty to express our opinion upon it, but we do not give a concluded opinion on any other point. All we can say is that there being *primâ facie* a contract between the Plaintiffs and *Luck*, what ought to be done is to keep things *in statu quo* till the hearing. [His Lordship then expressed his opinion that there was great doubt whether Captain *Turner* had any such right of pre-emption as would defeat the Plaintiffs' claim, and that as regarded him also matters should be kept *in statu quo* till the hearing.]

Under those circumstances I think that we ought to grant an injunction restraining both the Defendants from dealing with the English patent till the hearing or further order. Of course that will be accompanied with an undertaking on the part of the Plaintiffs to amend, and the usual undertaking in damages if at the hearing the Court thinks they are in the wrong.

LINDLEY, L.J.:—

The question we have to consider is what is proper to be done between this time and the hearing of the action. We have not now to decide the rights of the parties any further than is necessary for determining that question. In order to determine that question, it is absolutely essential to see whether the Plaintiffs have any *locus standi.* They put their case on the agreement, and if there is no agreement, they are out of Court. In my opinion there is an agreement, for I think that the correspondence running through February and March, and ending with the telegram of the 31st of March, amounts to an agreement to sell the English patent. That gives the Plaintiffs a *primâ facie* right to have matters kept *in statu quo* to this extent, that their rights under that agreement shall not be defeated before the hearing. Without expressing our opinion as to the rights or claims of Captain *Turner*, it appears to me that we ought not to allow him and Mr. *Luck* to deal with this patent so as to deprive the Plaintiffs of such rights as they seek to establish. The Plaintiffs must undertake to amend their writ, and they must give the usual undertaking to be answerable in damages, and there will be an injunction restraining Captain *Turner* and Mr. *Luck* from assigning or dealing with the patent until the hearing or further order.

As to the costs, we all think that the costs of the parties in the Court below ought to be costs in the action, and that the Plaintiffs ought to have the costs here.

Solicitors for Plaintiffs: *W. W. Wynne & Son.*
Solicitor for *Luck: J. H. Johnson.*
Solicitor for *Turner: E. Kennedy.*

H. C. J.

Ex parte BATH. *In re* PHILLIPS.

C. A.
1883
C. J. B.
Nov. 19.
C. A.
1884
June 20.

Proof in Bankruptcy—Loan from Building Society—Premium payable in Instalments.

A member of a building society borrowed from the society, on the security of a mortgage, £1200, for which he was to pay £144 premium and interest at 5 per cent. per annum. The principal, premium, and interest were made payable by the borrower to the society in a fixed number of monthly instalments, each of which consisted of principal, premium, and interest. The borrower having filed a liquidation petition, and the mortgage being insufficient:—

Held (affirming the decision of *Bacon*, C.J.), that the premium was not in the nature of interest, and that the society were entitled to prove for it in the liquidation.

H. J. PHILLIPS having filed a liquidation petition in the *Edmonton* County Court, his creditors, on the 16th of February, 1881, resolved on a liquidation by arrangement, and appointed a trustee. In the liquidation the *Liberator Permanent Benefit Building Society* tendered a proof for an amount which they alleged to be due to them by the debtor for arrears of repayments and fines, under covenants contained in three mortgage deeds executed by him in favour of the society, and for some costs and payments made by them on his behalf. In their affidavit of proof they stated their willingness to give up their security to the society on payment of a sum at which they assessed its value. One of the mortgages was given to secure payment to the society of a sum of £1200, which they had advanced to the mortgagor, a sum of £144 by way of premium or commission for the advance, and interest at 5 per cent. per annum on £1344 from the date of the deed. The whole amount was to be paid by monthly instalments of £12 12*s.* in each month during a term of twelve years. The deed provided that each monthly instalment should when paid be applied (1.) in payment of the interest due at the time of payment; (2.) in payment of the premium till the whole should be discharged; (3.) in payment of the principal. The provisions of the deed are fully stated in the report of *Ex parte Bath* (1).

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(1) 22 Ch. D. 450.

C. A.
1884

Ex parte BATH.
In re PHILLIPS.

The other two mortgage deeds were in a similar form. The Court of Appeal held in *Ex parte Bath* (1) that, as to so much of the amount claimed as represented interest payable subsequently to the filing of the liquidation petition, the proof could not be admitted. An account was then carried in by the society, and the Registrar of the County Court disallowed the claim of the society for all payments in respect of premiums which accrued due after the filing of the liquidation petition.

The Judge of the County Court affirmed this decision.

The society appealed to the Chief Judge. The appeal was heard on the 19th of November, 1883.

John Chester, and *Herbert Reed,* for the Appellants:—

The Registrar has taken the ruling of the Court of Appeal in *Ex parte Bath* on interest as applicable to premium; this is wrong.

A building society may charge a premium on the amount of an advance proportioned to the intended duration of the loan, and require that such premium be added to the principal sum advanced, and that interest be paid on the whole: *Harvey* v. *Municipal Permanent Investment Building Society* (2). We are entitled to the benefit of our contract, and to have interest on premiums and capital.

F. Turner, for the trustee:—

The Court must look at the substance, not at the form, and in substance these premiums are nothing but interest under another name. The case is analogous to the case of attempting to obtain an additional or further security by attornment at a fictitious or excessive rent: *Ex parte Williams* (3); *Ex parte Jackson* (4).

BACON, C.J.:—

By the mortgage deed the contract between the parties is plainly stated thus: "We will lend you £1200 if you will agree to become our debtor for £1344." I cannot alter the contract which the parties have thus made. The judgment of *Jessel,* M.R.,

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(1) 22 Ch. D. 450.

(2) 52 L. J. (Ch.) 349.

(3) 7 Ch. D. 138.

(4) 14 Ch. D. 725.

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Ex parte BATH.
In re PHILLIPS.

in *Ex parte Bath* (1) is that on which I am to rely. The mortgage deed provides for the payment of a gross sum of principal and premium. What is this "gross sum"? It is as much for the principal as for the principal and premium, and on this debt interest becomes due. Monthly instalments are only the mode in which the repayment is to be made, and that the premium and the principal are lumped in one sum cannot make any difference. I think, therefore, that the Registrar has gone wrong. There is only one aggregate sum, though it consists of capital and premium, and on that aggregate sum the mortgagee is entitled to interest. I make no order as to costs. The County Court Judge's order, confirming the Registrar's report, will be discharged.

F. G. A. W.

C. A.

The trustee appealed from this decision. The appeal was heard on the 20th of June, 1884.

F. Turner, for the Appellant:—

The premium is really interest under another name; it is not a sum which was ever received by the debtor. It is a bonus in the nature of interest paid by the society for the loan. The former decision of this Court in *Ex parte Bath* (2) applies: *Ex parte Robinson* (3).

John Chester, and *Herbert Reed*, for the building society:—

The premium is not at all in the nature of interest. The loan is made repayable in instalments for the convenience of the borrower and the premium is a lump sum which he agrees to pay for that convenience, and that sum also is for his convenience made payable in instalments. The method of repayment by instalments involves considerable trouble to the society, and this is compensated by the payment of a premium or bonus. The premium is due at once on the advance, though the payment of it is postponed; *debitum in præsenti, solvendum in futuro.*

F. Turner, in reply:—

The premium is really interest, and it can make no difference that it is called by another name. By calling all the payments of interest premium, the rule that interest accruing due after the commencement of a bankruptcy cannot be proved in the bankruptcy, unless there is a surplus, would be entirely evaded: *Ex parte Williams* (1). The question is as to the right of the general creditors.

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(1) 22 Ch. D. 454.

(2) 22 Ch. D. 450.

(3) 31 L. J. (Bkcy.) 12.

BAGGALLAY, L.J.:—

On the former occasion the attention of this Court was in no way directed to any possible distinction between principal and premium on the one hand, or between interest and premium on the other hand. The simple question then argued and decided was, that there could be no proof in respect of so much of the claim as represented interest which accrued subsequently to the date of the filing of the liquidation petition. The accounts have since been taken, and the objection is now raised that, as regards so much of the amount which is found due to the society as represents premium, it is in the nature of interest, not of principal, and that consequently there ought to be a disallowance in respect of it similar to the general disallowance in respect of interest. That, I take it, is the sole question which we have now to consider.

It has been contended that the former decision of this Court really disposed of the question, inasmuch as it directed the computation of interest only up to the time of the filing of the petition. I am of opinion that, having regard to the terms of the mortgage deed, the premium is clearly made a portion of the principal money, and is not in any way to be regarded as a debt in the nature of interest.

It has been suggested by Mr. *Turner* that a proceeding of this kind is of the nature of a fraud on the bankruptcy law. But when the matter was before the Court of Appeal on the former occasion they distinctly recognised the fact that the claim of the building society was made up of three parts—the original principal money, that which is called premium, and interest. If the Court had thought that the charge in respect of premium was one which ought not to be allowed in bankruptcy, the Court would

(1) 7 Ch. D. 138.

have taken cognisance of it then, and would not have sent the case back to the County Court to take the account in the way in which they did. In my opinion, therefore, the view of the Appellant is not well founded, but the premium is in the nature of principal and not in the nature of interest. The appeal fails, and it must be dismissed with costs. I think it is very unfortunate that the trustee did not direct attention to this matter on the former occasion. If he had done so much expense would have been saved.

COTTON, L.J.:—

I am of the same opinion. This point was certainly not decided in favour of the Appellant on the former occasion. I am in some doubt whether it was not really then decided against him. This Court directed an account to be taken of what was due to the society for principal, premium (without any limitation), and interest down to the commencement of the liquidation. Now, although under proper circumstances the Court would not hold the parties conclusively bound by that as to the premium, there was certainly nothing in the decision in any way in favour of the present Appellant except as to the principle, which is undoubted, that you cannot claim interest after the commencement of a bankruptcy in computing the amount of a debt. *Ex parte Robinson* (1) lays it down, though it was hardly necessary to cite an authority for that, that under whatever guise interest is introduced into a contract, the Court, if it finds that the real intention was to give interest in another form, will not allow a proof in respect of it in bankruptcy.

Is then this premium, independently altogether of our previous decision, really interest? In my opinion it is not. The debtor, who was a member of the society, applied for an advance of £1200, which they agreed to give him, he agreeing to pay £144 as and by way of commission for the advance. These building societies lend money on very special terms, and they always, as they have a perfect right to do, require premiums for the advances which they make. What is done with the premium in this case? It is added to the £1200, and the debtor agrees to pay the two sums of £1200 and £144, making the aggregate sum of £1344, together with interest thereon from the date of the mortgage deed; that is, on both sums he pays interest. Then the payment of principal, premium, and interest is to be made by monthly instalments of £12 12*s*., and the deed provides that the £12 12*s*. is to be applied, first, in payment of interest, next in payment of the premium, and then in payment of the principal money advanced. But there is nothing to shew that the premium is really interest under another guise. It is true the payments depend on the time in which the loan is to be repaid, for the society agreed not to call in the loan except in the way provided by their rules and by the deed. Of course the value, to the borrower, of the sum which was to be advanced on the mortgage depends upon the time for which the society bind themselves not to require its repayment. But the premium is a certain sum which is covenanted to be paid, and a debt is created at once, although the society agree that they will not require the payment of it to be made, as they agree not to require repayment of the money actually advanced, except by certain instalments. It is clear to my mind that this premium is not merely interest under another name, but that it was agreed to be paid as a principal sum due by the person applying for the loan as that which the advance was worth to him over and above any interest which the society might require. In my opinion, therefore, the Chief Judge was right, and the appeal must be dismissed.

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(1) 31 L. J. (Bkcy.) 12.

LINDLEY, L.J.:—

I am of the same opinion. On looking at the mortgage deed and considering the mode of working these societies, I am quite satisfied that this premium has nothing whatever to do with interest. It is a sum which is not altogether arbitrary, because it is calculated with reference to the duration of the loan. The object is to fix a sum which it will be worth the borrower's while to pay for the accommodation granted him by the society—that accommodation being the payment of the principal and interest by instalments. It is not a cloak for getting compound interest, or anything of that kind; it is a charge made for the convenience granted to the borrower. There is nothing illegal in it, nothing uncommon, nothing oppressive, and it appears to me that it would be an entire mistake to call it interest in any sense or shape. If you look at the deed it is quite plain it is not treated as interest, because the deed draws a distinction between the actual sum advanced, the £1200, the premium, and the interest. The advance and the premium are first capitalized, and interest is charged on the aggregate sum, and then there is the clause which provides for the application of the instalments. But we must look at the substance of the thing, and I am satisfied that the premium is not in the nature of interest. I think the Chief Judge was quite right.

Solicitor for trustee: *H. Rumney.*
Solicitors for society: *Bonner, Wright, & Co.*

W. L. C.

In re NORWICH EQUITABLE FIRE INSURANCE COMPANY.

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V.-C. B.
June 20.
C. A.
Aug. 8.

Winding-up—Examination of former Officer under Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 115 [*Revised Ed. Statutes, vol. xiv., p.* 227]—*General Order of the* 11*th of November,* 1862, *Rule* LX.—*Leave to Creditor to attend " the Proceedings "—Right of Creditor to be present.*

A person who had brought in a large claim as creditor of a company which was being wound up, obtained an order giving him liberty " to attend the proceedings in this matter at his own expense." The liquidator afterwards took out a summons under sect. 115 for the examination of a former officer of the company with a view to obtaining information as to the circumstances under which the claim of the alleged creditor arose. The alleged creditor claimed a right to be present at the examination:—

Held (affirming the decision of *Bacon*, V.C.), that he ought not to be allowed to be present at the examination.

AN order for winding up this company was made on the 14th of June, 1883. The *Royal Insurance Company* and several other insurance companies brought in claims to rank as creditors for sums amounting to about £20,000. On the 17th of December, 1883, on the application of these companies, an order was made " that the said insurance companies be at liberty to attend the proceedings in this matter at their own expense."

The official liquidator after this obtained an order under the

Companies Act, 1862, s. 115, for the examination of Mr. *J. S. Skipper*, the late manager of the company. The liquidator deposed that the claims of the above insurance companies to a great extent arose out of agreements or arrangements styled "treaties" alleged to have been entered into on behalf of the *Norwich Company* with the insurance companies; that the books and papers of the *Norwich Company* had been carelessly kept, and that it was impossible to obtain substantial information from them about the treaties; that the late officers of the company were the only persons who could supply reliable information; that *Skipper* was the chief person who on behalf of the *Norwich Company* was concerned with the treaties; that he was a hostile witness, and that it was not advisable to put him forward as a witness in opposition to the claims of the insurance companies; and that the order for his examination had therefore been obtained under sect. 115. The order directed the examination of the witness but did not state that it was under sect. 115.

An appointment was made for the examination of *Skipper* on the 11th of June, 1884, and notice of it was given to the insurance companies. They instructed counsel to appear and cross-examine. On the appointment being attended the liquidator stated that the examination was under sect. 115, and that he objected to the attendance of the insurance companies. They accordingly retired, on the arrangement that the matter should be brought before the Judge, and that if he decided that they were entitled to be present they should be furnished with a copy of the depositions.

The liquidator accordingly moved, on the 20th of June, 1884, before Vice-Chancellor *Bacon*, for a declaration that the *Royal Insurance Company* were not entitled to attend any examinations or proceedings instituted or carried on by the official liquidator under sect. 115, and that they might be directed not to attend any such examinations or other proceedings, and that, if necessary, the order of the 17th of December, 1883, might be discharged or varied.

Marten, Q.C., and *Seward Brice*, for the official liquidator:—

This is not "a proceeding" within the meaning of the 60th Rule of the General Order of November, 1862, regulating sect. 115

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of the *Companies Act*, 1862: *In re Grey's Brewery Company* (1); and the Court will direct that the claimant do not attend.

Methold, for the witness, asked that the examination might be conducted as privately as possible.

Hemming, Q.C., and *Cababé*, for the claimant, the *Royal Insurance Company* :—

We rely on *In re Grey's Brewery Company* as an authority in our favour. The decision was based entirely on the fact that the applicant had not obtained an order to attend proceedings, and applied under rule 60. Such an order takes the case out of *In re Grey's Brewery Company*, and brings it within *In re Empire Assurance Corporation* (2), with which Mr. Justice *Chitty* agreed.

The *Norwich Company* were in the habit of entering into reinsurance treaties, under which the *Royal* were to take a portion of the risk; and under these treaties the *Royal* have claims amounting to between £13,000 and £14,000. *Skipper* was the manager of the *Norwich Equitable*, and the official liquidator, by examining *Skipper*, is getting up evidence to be used against us. Can it be right that this examination is to be taken in a private room? The liquidator is seeking evidence to shew that these treaties were *ultrà vires*; is it just that this evidence should be given in our absence?

In this instance we have a distinct, substantive order, giving us leave to attend. Our right, therefore, has to be displaced. This is, to all intents and purposes, an action. The Court, in the exercise of its discretion, will hold an even hand between two litigants, and not allow either party to have an advantage over the other. It is impossible to see how the liquidator can be injured by our presence. When the 115th section is used for discovery only, there may be reason for excluding an opponent, when it is in substance to get evidence on an issue raised there is none.

BACON, V.C.:—

The question is purely one of principle.

The clause of the *Companies Act*, which has been referred to, is a repetition in almost the very words of an old clause in the Bankruptcy Act of 1849 (1), and for a very good reason, because between a bankrupt and an insolvent company the distinction in substance is hardly to be perceived. At that time a bankrupt concealing his estate brought himself to the gallows—many a bankrupt has been hanged for concealing his property. The law enabled the assignee in bankruptcy to seek for evidence wherever he could find it, for the purpose of proving his case. The statute gave him most inquisitorial powers to endeavour to find out evidence to support the case which he had to advance against the person accused.

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(1) 25 Ch. D. 400.

(2) 17 L. T. (N.S.) 488.

How does that differ from this case? The official liquidator, whose duty it is to establish against the *Royal Insurance Company* some claim (I do not know what it is, nor have I inquired), knows a man who can give him information which will enable him, the liquidator, to discharge his duty, and he summons him under the statute and examines him. Who has a right to be present at that examination but the liquidator? What right has any one else to be there? I might as well—if the liquidator were to state a case for the opinion of counsel—give to a creditor, entitled "to attend the proceedings," a right to have that case and opinion produced to him. It is altogether a mistake to suppose that the 115th section gives anybody a right to pursue the examination except the liquidator, whose duty it is to ascertain the truth and establish it, if he can, by means of evidence.

Mr. *Cababé* is reduced to urge that his client will be put in a worse position if he cannot attend this examination; for he says, If the liquidator examines a witness who is not favourable to him, his client will know nothing about it, and if he examines one who is favourable to him, then he will turn that into an affidavit, and make use of it as evidence. Of course he will; but what follows? The person against whom the affidavit is used knows what is said against him, and has the means of cross-examining upon the affidavit and of rebutting the charge if he can find out materials for doing so.

But the case is one, as I have said, in which, upon principle merely, the liquidator's hands are not to be tied in pursuing his

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(1) 12 & 13 Vict. c. 106, s. 120, following 6 Geo. 4, c. 16, s. 33.

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investigation. He is not obliged to disclose to adverse parties all that he can prove or may fail to prove.

According to the facts in the case before Vice-Chancellor *Stuart* (1), there were adverse interests which the party entitled to attend had a right to bring before the Court. The case before Mr. Justice *Chitty* went upon another ground, and I need not further refer to it.

But upon the principle of the 115th section, and upon the principle upon which the law is administered under the 115th section, the *Royal Insurance Company* have no more right to be present than they have to be present in any consultation which the liquidator may hold with his counsel, or with his solicitor, on the subject of anything which he may find towards establishing the case which it is his duty to urge before the Court.

In my opinion the *Royal Insurance Company* have no more right to be present at this private examination than any stranger, for not a word that is there uttered in the way of examination can be adduced against the *Royal Insurance Company* without an opportunity of answer, nor can the *Royal Insurance Company*, under any circumstances, be in a worse position than if the examination had never taken place.

There will be a declaration that the *Royal Insurance Company* are not entitled to attend any examination or proceeding instituted or carried on by the official liquidator under or in pursuance of sect. 115.

It appearing that the liquidator had served the *Royal Insurance Company* with a summons to attend the examination, the Court held that the Respondents could not be required to pay the costs of the summons; but the *Royal Insurance Company* were ordered to pay the costs of the adjournment into and the hearing in Court; the costs of the attendance of the witness at the hearing being allowed as costs of his attendance generally, counsel for the liquidator not objecting.

J. B. D.

C. A.

The *Royal Insurance Company* appealed from this decision, and the appeal was heard on the 8th of August, 1884.

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(1) 17 L. T. (N.S.) 488.

Hemming, Q.C., and *Cababé*, for the appeal:—

This is clearly a proceeding in the winding-up, and under our order we have liberty to attend it. There is nothing in sect. 115 to exclude our right, for that section does not lay down who is to conduct the examination or who are to be present.

[BAGGALLAY, L.J.:—Are you not asking to see your opponent's brief?]

No, we are only asking to be present at the taking of evidence which ought not to be taken behind our backs.

[COTTON, L.J.:—Do you say that the depositions taken *ex parte* on a private examination could be used as evidence against you?]

Perhaps not strictly evidence, but they are often read.

Even if they are not evidence, a most unfair advantage will be given to the liquidator if the depositions are taken *ex parte*, for he can pick out such parts of them as he pleases and embody them in affidavits, omitting what makes against him. We ought, therefore, to be allowed to attend, though we do not ask to be allowed to cross-examine. The precise point for which we contend was decided in our favour in *In re Empire Assurance Corporation* (1), and this decision was approved in *In re Grey's Brewery Company* (2), the conclusion there arrived at, that the creditors had no right to attend, being only a decision under the General Order of the 11th of November, 1862, rule 60. The present case is not one of a vague claim as to which the liquidator wishes to get information, but there is a well-defined issue between us and the company. No possible injustice can be done by allowing us to attend.

Marten, Q.C., and *Seward Brice*, *contrà*, were not called upon.

BAGGALLAY, L.J.:—

In the course of the liquidation of this company the *Royal Insurance Company* claimed to rank as creditors, and on the 17th of December last obtained an order giving leave to themselves and some other companies to attend the proceedings at their own expense. A person has been summoned under sect. 115 of the *Companies Act*, 1862, to give information as to the affairs of the company, and the *Royal Insurance Company* contend that they have a right to be present at the examination. The Vice-Chancellor has decided against this contention, and I think his decision right. For the last twenty-two years complaints have been constantly made against the inquisitorial character of sect. 115. I often made them as counsel, and have since heard them as a Judge. But the Legislature thought fit to give this power in winding-up, as it had previously done in bankruptcy, because the exigencies of justice required it. The officials of a company which is being wound up are often unwilling to give information, and this power of compelling them to do so was therefore conferred on the Court. I consider that the power given by sect. 115, though it is a strong power, is intended to put the liquidator, so far as can be, in the same position as if he were making inquiries through his solicitor from persons who were willing to give information; the object is that he may see what it is advisable for him to do. The depositions are not evidence, though they can be made evidence by being embodied in an affidavit, or by examining in the presence of the opposite party the person who has made them. No doubt the liquidator gains a great advantage by this mode of ascertaining what evidence can be had, but it is an advantage which the Legislature intended to give him.

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(1) 17 L. T. (N.S.) 488.

(2) 25 Ch. D. 400.

In my opinion this is not a proceeding within the meaning of the order giving the Appellants liberty to attend proceedings. If the liquidator were applying for leave to commence an action against the Appellants, that application would in some sense be a proceeding, but could it possibly be said that the Appellants had any right to be present? This, to my mind, is nothing but a preliminary inquiry for the information of the liquidator, and the Appellants have no right to intervene.

COTTON, L.J.:—

I am of opinion that the order of the Vice-Chancellor cannot be disturbed. It is not necessary, in my opinion, to decide whether this is a proceeding within the meaning of the order giving leave to attend, though I am disposed to agree with the view that it is not. In construing the order, the word "proceedings" must receive a reasonable construction; for instance, the order could not be held to authorize the party to attend an application for leave to bring an action against himself. I do not, however, go upon that, but upon the ground that, however the order is construed, the Court must still have a discretion to prevent a party from attending any particular proceeding. This is not a proceeding for the purpose of taking evidence, but of getting information. The liquidator learns what the witness will say, but the deposition is not evidence against the party whose claim the liquidator is opposing, because that party has not had an opportunity of attending. If the depositions were evidence there would be a right to cross-examine; but the Appellants do not ask to cross-examine, they are only seeking to get the benefit of the information which the Act intended to enable the liquidator to get for his own purposes. They wish to be present in order to obtain information, not for the purpose of assisting the company, but of establishing a claim against it, and to allow them to do so would be going against the spirit and object of the 115th section.

Solicitors for Official Liquidator: *Boxall & Boxall.*
Solicitors for *Royal Insurance Company: E. W. & R. Oliver.*

H. C. J.

In re MADDEVER.

THREE TOWNS BANKING COMPANY *v.* MADDEVER.

[1881 M. 3886.]

C. A.
1883
NORTH, J.
June 1, 2, 4.
C. A.
1884
July 26, 28.

Fraudulent Conveyance—13 Eliz. c. 5—Laches.

A specialty creditor brought an action to set aside a conveyance as fraudulent under 13 Eliz. c. 5, nearly ten years after the death of the grantor. The Plaintiff had been aware of the facts during the whole of that period, and gave no satisfactory reason for his delay:—

Held (affirming the decision of *North*, J.), that as the Plaintiff was coming to enforce a legal right his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law.

On the 26th of November, 1870, *E. Fry*, and *John Maddever* and *J. Pearn*, as his sureties, gave to the *Three Towns Banking Company* their joint and several bond in the penal sum of £160, to secure the repayment with interest as therein mentioned of the sum of £80, by quarterly instalments of £8 4*s.* 3*d.*, and if default was made in payment of any money at the time appointed for payment, or if any of the obligors should die or become bankrupt or insolvent, the whole sum remaining due was to become immediately payable.

The instalments which became due in February and May, 1871, were paid, but no further payment was made, and on the 5th of October, 1871, the company sent to each of the obligors a demand in bankruptcy for £91 6*s.* 9*d.*, the whole amount due. *Fry* absconded, and on the 10th of October, 1871, a debtor summons under the *Bankruptcy Act*, 1869, was issued against *Maddever*, and served on him on the following day. At or about the same time a similar summons was issued against *Pearn*. Petitions in bankruptcy were presented against them on the 2nd of November, and the petition against *Maddever* was served on him a day or two afterwards. *Pearn* was adjudged bankrupt, but the petition against *Maddever* was adjourned till the 22nd of November. On the 18th he died intestate.

On the 19th of October, 1871, *Maddever* had executed a conveyance, which bore date the 1st of July, 1871, by which he conveyed to his eldest son the Defendant *James Maddever* in fee a freehold farm worth about £20 a year, in consideration of a sum of £21, and of a life annuity of £16. The grantor was of the age of more than eighty years, and had no other property.

The bank were informed of the deed shortly after the death of the grantor. Their solicitor stated to the Defendant that the deed was a fraud on them, and on the 16th of May, 1872, wrote to the Defendant that unless the amount due from the father was paid, or some satisfactory arrangement entered into for liquidation thereof within a week, proceedings would be commenced in the Court of Chancery to obtain payment. The Defendant's then solicitors replied that they would defend any proceedings. Nothing was done by the company till October, 1881, when they procured letters of administration to the estate of the intestate *Maddever* to be granted to *Bayly*, as their nominee, and a few days afterwards the bank and *Bayly* commenced this action against *James Maddever* to set aside the conveyance of October, 1881. The company, to explain their delay, alleged that they had been advised that they must make the father's personal representative a party to any proceedings, and that they had been unable to find out who were the persons who could be cited to take out or renounce letters of administration, until they casually obtained information on the subject in April, 1881.

The Defendant, who was examined, stated that he had repeatedly advanced money to his father, though he could not give particulars, and had no receipts, and that he had assisted his father in managing the farm. He said that his other brothers had been advanced by the father, and that the making over this farm to him had been talked about between them for about two years, but that no definite arrangement was made till 1871. The solicitor who prepared the deed said that the father and son had repeatedly called upon him about it for a year or two before it was executed, but that he received no definite instructions till the 29th of September, 1871. The Defendant had made a mortgage of the property since his father's death, but the mortgagee was not a party to the action.

The action was tried before Mr. Justice *North* on the 1st, 2nd, and 4th of June, 1883.

Higgins, Q.C., and *Eyre*, for the banking company:—

Strong v. *Strong* (1) as to consideration.

Warmington, Q.C., and *Morshead*, for *Maddever*:—

The deed was not voluntary, but was for valuable consideration, the annuity and the money paid. This was the only son not set up in business, and the father made this property over to him: *Turner* v. *Collins* (2); *Hovenden* v. *Lord Annesley* (3); *Gale* v. *Williamson* (4); *Golden* v. *Gillam* (5); *Wright* v. *Vanderplank* (6). But independently of this the lapse of ten years is a bar: *Wright* v. *Vanderplank*. The deed is not void, but only voidable, and in such cases a plaintiff cannot after lying by for years and allowing the debtor to deal with the property and make improvements, come forward and claim it. There is no case in which such a deed has been set aside ten years after. It is ruinous to a man to allow him to go on and live in the belief that property is his, and then to deprive him of it. *Hatch* v. *Hatch* (7) was a very peculiar case. At all events, the Plaintiffs cannot recover more than the penalty named in the bond.

Eyre, in reply.

NORTH, J., after stating the facts of the case, said that it was clear that nothing had been previously settled between the father and the son, and that the father had consulted a solicitor as to the debtor summons. The ante-dating the deed had at first struck him as very significant in considering whether the deed was in good faith. That, however, had been explained, and as explained was not important. Then what have I to consider? In *Golden* v. *Gillam* (8) Mr. Justice *Fry* cites the observations of Vice-Chancellor *Kindersley* in *Thompson* v. *Webster* (9),

(1) 18 Beav. 408.
(2) Law Rep. 7 Ch. 329.
(3) 2 Sch. & Lef. 607, 630.
(4) 8 M. & W. 405.
(5) 20 Ch. D. 389.
(6) 8 D. M. & G. 133.
(7) 9 Ves. 292.
(8) 20 Ch. D. 389, 392.
(9) 4 Drew. 658, 632.

and the Vice-Chancellor puts so pointedly what I have to do that I will read and adopt it. He says: "The principle now established is this. The language of the Act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder, or delay creditors, the Court is to decide in each particular case, whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder, or delay his creditors." Now this matter had been pending for a long time, but is brought to a focus just at the time when this particular demand was made. That the effect of it was to prevent the creditors being paid I cannot have any doubt, and it appears also—and *Freeman* v. *Pope* (1) is an authority for that if necessary—that a person must be taken to intend what is the natural consequence of his acts. Therefore, although there was no such intention, still if I saw that the necessary effect of the deed was to defeat or delay creditors, I must see in the execution of the deed an intention to do so. But the present case goes rather further, because I think the reason why this matter was brought to a point and the conveyance was executed, was in order to anticipate the ripening of the demand which had been expressed in a letter, and was clearly understood to be preliminary to an application for ulterior proceedings. Soon after that the debtor's summons was actually issued, and it is admitted by the Defendant that before the 19th of October, when that deed was executed, *Maddever* had actually been served with a debtor's summons. Therefore, at the time when the deed was executed, not merely was there a threat of that proceeding, which the solicitor no doubt well understood and explained to his client, but we have also the further proceeding taken that he saw would follow, namely, the issue of the debtor's summons. Under these circumstances that deed was executed, and I must say it seems to me clearly shewn that it was made with the intent and object of conveying the property away before the power of transferring it to the son was destroyed by these proceedings ripening into a bankruptcy.

Then it was said that there was valuable consideration given by the son. The property was and is worth between £450 and £500.

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(1) Law Rep. 5 Ch. 538.

The value of the consideration given was £21 paid down and a covenant to pay an annuity to a man who was over eighty years of age, which is shewn to be of the value of about £67, therefore, making £88 or £90, the value of the consideration agreed to be given; not actually given, but part only of it given, and the part given is £21. It does not appear even that the portion of the annuity which was already payable was paid; but that in itself is a minor circumstance, because the total consideration given and agreed to be given is something under £97, and the property is upwards of five times that value. Under those circumstances the fact that there was this consideration given does not prevent my coming to the conclusion that the deed was one made for the purpose of defeating and delaying creditors.

Then there is this also to be borne in mind. It appears that the grantor remained on the premises. I think that must have been so, although the Defendant *Maddever* said he went elsewhere. I think as regards that, that the evidence of the man who served the debtor's summons is more likely to be correct than that of Mr. *Maddever* as to the time at which his father removed. What he says is that he is quite certain he did serve the debtor's summons and the petition in bankruptcy both at the same place, and the petition in bankruptcy was not served until some days after—a fortnight or something of that sort after the deed was executed. [His Lordship then disallowed a claim by the son for £15 as paid by him.]

Another objection raised is this. It assumes that if proceedings had been taken at once, the right to set aside the deed would have been clear, but that as proceedings were not taken for ten years the Plaintiffs are disentitled now to take proceedings which they could have taken ten years since. But what was the position of the parties as to that? The argument assumes that the deed could not have been supported if proceedings had been taken at the time. The son was a party to it; he knew what the whole transaction was, and knew precisely what position he was in; he knew what the facts were, what consideration he had paid or promised to pay; that he had the property, and that the Plaintiffs claimed to have their debt paid out of that property. Under those circumstances, he having full notice all along, it is said that the fact of their abstaining from taking proceedings against him gives him some equity to say that they ought not to take proceedings now. Where parties have been merely non-active, I do not see any reason why they should not take proceedings at any time while the debt is a subsisting debt. The time might have arrived when the *Statute of Limitations* would be a bar, and, of course, when the debt was gone no proceedings could be taken in respect of it; but when you have the Plaintiffs merely abstaining from enforcing as against the Defendant a right which it was admitted they had at one time, and the Defendant is simply left in possession of the property with knowledge of all the circumstances, I do not see what he has to complain of. I do not see how he is in any way the worse; but if the property had been let, and if any application was made to me now to make him account for past rents for ten years, or if there were any application to charge him with an occupation-rent for that time, then I can quite understand that observations of that sort might have some weight. Here, however, considering all that has taken place, and that he was left in possession of the property, I do not see that there is any time short of that prescribed by the *Statute of Limitations* which would deprive the Plaintiffs of their right to take the steps they have done. Therefore the argument that delay has deprived the Plaintiffs of their rights, I cannot accede to.

Then it is said further, they allowed him to deal with the property. As to that I cannot see that there was any allowance. They left him in possession, but it does not appear that they had any notice or knowledge that he did deal with the property still, if they left him in possession they must take the consequences, and any dealing he had the power of effecting by which they could be prejudiced they must submit to. It does appear that he has effected a mortgage which may very likely embarrass the Plaintiffs very considerably, and which in fact may be good against them. But as regards him he loses nothing by the mortgage. No doubt he created a charge on the property with an obligation to pay, but he actually got the money which is the subject of the mortgage, and he was content. Therefore, I do not see that there was any prejudice done to him by allowing him to remain in possession of the property, and to deal with it in that way.

Under these circumstances I think the Plaintiffs are entitled to the decree they ask, subject to the point raised by the Defendant that £160 is the maximum sum recoverable, and that I think quite clear. The decree, therefore, will be a declaration that the conveyance is void against the Plaintiffs and the other creditors of *Maddever* deceased. It must be as against the other creditors also as matter of form, although it does not appear there are any others. Of course, if there were others which are barred by the statute they will get nothing by it.

C. M.

The judgment declared that the deed was void as against the Plaintiffs and all other, if any, the creditors of *John Maddever;* directed an account of what was due from the estate of *John Maddever* to the Plaintiffs (not exceeding the penalty of the bond) and the other creditors, if any, of *John Maddever*, and declared that the property conveyed by the deed was liable to make good the amounts which should be certified to be due on taking the account. The Defendant was ordered to concur in all necessary acts and conveyances for the purpose of raising such amount out of the property, and liberty was given to the Plaintiffs to apply in Chambers for a sale.

C. A.

The Defendant appealed, and the appeal was heard on the 26th and 28th of July, 1884.

Morshead, for the Appellant:—

The deed was executed by the father in fulfilment of a family arrangement of many years standing between the father and son, the consideration being partly valuable and partly meritorious. The son had worked for the father on his farm, and assisted him with small pecuniary advances from time to time, and had not been brought up to a trade, like his brothers, and there was further pecuniary consideration when the deed was executed. All the terms of the deed were arranged, and final instructions given to the solicitor for its preparation, not only before any claim was made, but before any debt existed. There was a good and honest purpose in this deed, and this is sufficient to support it, although in the result a creditor may be defeated: *Copis* v. *Middleton* (1); *Thompson* v. *Webster* (2); *Holmes* v. *Penney* (3); *Golden* v. *Gillam* (4); *Alton* v. *Harrison* (5). But if the deed was impeachable originally, the Plaintiffs' right to set it aside is barred by laches and a delay of ten years, and the serious alteration of the Defendant's position in that time. There must be some limit to proceedings of this kind. You are not entitled to keep a sword hanging over a man's head all those years, and allow him to incur obligations in mortgaging and dealing with his estate which he would never have incurred if he had had any reason to believe that this stale claim would be prosecuted. The parties were at arm's length in 1871, and it is too late to commence proceedings in 1881, when the Plaintiffs were in full possession of the facts at the earlier date: *Hatch* v. *Hatch* (6); *Wright* v. *Vanderplank* (7); *Turner* v. *Collins* (8).

Higgins, Q.C., and *Eyre*, for the Plaintiffs:—

Mere delay to enforce a legal right does not create any equity; there must be something more than mere delay, something which makes it inequitable to enforce the right: *De Bussche* v. *Alt* (9). In *Wright* v. *Vanderplank* there was a deed good at law which it was sought to impeach on equitable grounds, and the other cases referred to by the Appellant stand on the same footing. Mere delay may bar an equitable right, but here we stand on a legal right and delay is no bar to our enforcing it, as the *Statute of Limitations* has not run. [They were then stopped by the Court.]

Morshead, in reply.

BAGGALLAY, L.J., after shortly stating the facts, said:—

It is urged that instructions were given for the deed on the 29th of September, 1871, at a time when no claim by the Plaintiffs was in contemplation; but we can only look to the state of

(1) 2 Madd. 410.
(2) 4 Drew. 628.
(3) 3 K. & J. 90.
(4) 20 Ch. D. 389.
(5) Law Rep. 4 Ch. 622.
(6) 9 Ves. 292.
(7) 8 D. M. & G. 133.
(8) Law Rep. 7 Ch. 329.
(9) 8 Ch. D. 286.

things at the time when the deed was executed, namely, the 19th of October, which was after the service of the debtor's summons. The deed was evidently executed with a view of benefiting the son at the expense of the father's creditors. It is said that the father had advanced his other children, but not the Defendant, and that therefore it was reasonable for him to make some provision for the Defendant. No doubt it would have been reasonable for him to do so, if he could have done it without prejudice to his creditors, but he had no right to do it so as necessarily to interfere with their claims. Therefore, as regards the question whether this deed was originally liable to be set aside under 13 Eliz. c. 5, I think the case unarguable.

The deed was executed on the 19th of October, 1871, and the bank became aware of it almost immediately after the death of the father, but took no proceedings to impeach it for nearly ten years. It was urged for the Defendant that, assuming the deed to have been one which ought originally to have been set aside, it ought not to be set aside now, after such delay. The bank appear from the first to have known a good deal about the facts, and if the case had been one where the Plaintiffs were coming to set aside, on equitable grounds, a deed which was good at law, I should have thought that the defence was good. But the Plaintiffs had a legal right, and I do not see how that right can be lost by mere delay to enforce it, unless the delay is such as to cause a statutory bar. Cases have been cited where Courts of Equity have refused to interfere on the ground of delay, but they have been cases where relief was sought merely on equitable grounds; here the Plaintiffs have a legal right. I am therefore of opinion that the decision appealed from is correct; but as the mortgagee is not before the Court, his interest cannot be interfered with, and the judgment should be varied by restricting it to the Defendant's interest in the property.

COTTON, L.J.:—

The Plaintiffs in this case say, "We are creditors whose debt is not barred, and we seek payment out of property conveyed away by the debtor by a deed which the statute of 13 Eliz. c. 5, makes void as against us." The Defendant relies on the delay of the

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creditor; but I am of opinion that this defence is not effectual. The cases referred to on his behalf do not apply, they were cases where one of the parties to the deed sought to set it aside on equitable grounds. Here the action is not by one of the parties to the deed, but by creditors who come to enforce a legal demand. An action of that nature stands on quite a different footing from an action to set aside a deed on equitable grounds. I am of opinion that in the case of a legal right we cannot refuse relief to the plaintiff on the mere ground of delay, unless there has been such delay as to create a statutory bar. The Plaintiffs have made an attempt to explain their delay; an attempt in which I am of opinion they have not succeeded, but, there having been no such delay as to bar their legal right, it is, in my judgment, immaterial that they have shewn no sufficient reason for not coming sooner. As regards the original invalidity of the deed, I agree with the remarks of Lord Justice *Baggallay*. The judgment will stand with the variation proposed by him.

LINDLEY, L.J.:—

I am of the same opinion. I believe there had been an honest intention on the part of the father to make this property over to the son, but there was no binding arrangement; and a conveyance carrying that intention into effect after bankruptcy proceedings had been commenced is clearly within the statute. No equity arises from mere delay to enforce a legal demand, and, unless there are other circumstances to create an equity, the only question is whether the legal demand has been barred or not.

Solicitor for Plaintiffs: *A. Cheese.*
Solicitors for Defendant: *Cowlard & Chowne.*

H. C. J.

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[1884 D. 231.]

Practice—Transfer to County Court—Plaintiff failing to proceed—Jurisdiction of Superior Court—County Courts Act, 1867, *ss.* 7, 8, 10 [*Revised Ed. Statutes, vol. xv., pp.* 647, 648]—*County Court Rules*, 1875, *Order* xx., *r.* 1—*Judicature Act*, 1873, *s.* 67.

Where an order has been made for the transfer of a Chancery action to a County Court under sect. 8 of the *County Courts Act*, 1867, the Superior Court retains its jurisdiction in the action until the transfer has been completed by all necessary steps being taken for that purpose.

BY an order made in Chambers in this action on the 25th of April, 1884, upon the application of the Defendant and in the presence of the solicitors for both parties, "it was ordered that, pursuant to the 30 & 31 Vict. c. 142 (*County Courts Act*, 1867), s. 8, the action be transferred to the County Court of *Glamorganshire*, holden at *Cardiff*. And it was ordered that all original documents filed therein be transmitted to the said County Court; and the costs of this application were to be costs in the action."

The order was not served upon the Plaintiff personally.

The Plaintiff having failed to enter the action for trial at the *Cardiff* County Court or to take any steps whatever for that purpose, the Defendant now moved to dismiss the action for want of prosecution unless the Plaintiff did within one week enter the action in the County Court pursuant to the order.

Warrington, for the Defendant:—

The question is, what is the practice of the Court where an order has been made for transfer of an action to a County Court, and the plaintiff refuses to proceed.

By sect. 67 of the *Judicature Act*, 1873, sects. 7, 8, and 10 of the *County Courts Act*, 1867, as to remitting actions to the County Court, are made applicable to actions in the High Court. Order xx., r. 1, of the *County Court Rules*, 1875, provides that "where any

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action is remitted by order of the High Court of Justice to a County Court, the plaintiff shall lodge with the Registrar thereof the order and the writ, and also a statement of the names and addresses of the several parties to the action, and their solicitors, if any, and a concise statement of the particulars, such as would be required upon entering a plaint, signed by the plaintiff or his solicitor, and the Registrar shall thereupon enter the action for trial, and give notice to the parties of the day appointed for such trial, by post or otherwise, ten clear days before such day, and shall annex to the notice to the defendant a copy of the particulars." Thus, under that rule, it is the plaintiff, and the plaintiff alone, who can take the necessary steps for having the action entered for trial. Until the plaintiff has lodged the writ and order remitting the action with the Registrar of the County Court, the action remains in the Superior Court, which therefore retains its jurisdiction to make any order in the matter: *Welply* v. *Buhl* (1). In giving judgment in that case Chief Justice *Cockburn* says (2), "Then, how does the case get to the County Court? Not by virtue of the order, for the Act provides that the plaintiff shall himself take it there by lodging the writ and the order remitting the action with the Registrar. Unless and until he does so the County Court has no jurisdiction, for it can only acquire the jurisdiction by the mode of procedure prescribed by the Act. In the meantime it appears to me that the cause remains in the Superior Court. I feel the force of the argument that the plaintiff cannot be allowed to keep up that state of things indefinitely; but it seems to me that the remedy, if the defendant wishes to force the plaintiff either to abandon the action or to take it to the County Court, is by applying for a further order to compel him to adopt one of these two courses." An objection may be raised that the order in that case was made in a common law action under the 10th section of the *County Courts Act*, 1867, whereas the order in the present case—a Chancery action—was made under the 8th section. The answer is that the case is governed by the *Judicature Act.*

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(1) 3 Q. B. D. 80, affirmed on appeal Ibid. 253.

(2) 3 Q. B. D. 81.

Hadley, for the Plaintiff:—

I submit that the Superior Court has lost its jurisdiction over this action, and that if the Plaintiff does not go on, the Defendant has power to do so. The words, "the plaintiff shall lodge the original writ and the order with the Registrar," which occur in sects. 7 and 10 of the *County Courts Act*, 1867, are not to be found in sect. 8, which alone relates to Chancery proceedings. The section merely says that when an order for transfer of a Chancery suit or proceeding has been made, "such suit or proceeding shall be carried on in the County Court." So that either party, whether plaintiff or defendant, has it in his power to apply to the Registrar and bring the action to trial. Consequently, when your Lordship made the order of transfer of the 25th of April your jurisdiction over the action ceased to exist. Order xx., r. 1, of the *County Court Rules*, 1875, does not require that the plaintiff, and the plaintiff alone, shall apply to the Registrar. Moreover, the order of the 25th of April was never served upon the Plaintiff personally.

BACON, V.C.:—

I have no doubt as to the practice or jurisdiction in such a case as this, but the order here has not been served upon the Plaintiff.

If the order had been properly served upon the Plaintiff, it would have been her duty to enter the action in the County Court at once; but that was not done, and this application has in consequence become necessary. I have no doubt that where an order has been made for the transfer of an action to a County Court, until thet ransfer is actually completed by the necessary steps being taken for that purpose the jurisdiction of the Superior Court still remains.

Under the circumstances I shall make a supplemental order fixing the day within which the Plaintiff do enter her cause. The order is that within one week from this day the Plaintiff do enter her cause in the County Court. If she makes default, the Defendant may apply to me again to have the action dismissed.

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The supplemental order was in the following terms:—

"Vary the order of the 25th of April, 1884, by directing the Plaintiff within one week from service of this order to lodge the necessary documents with the Registrar of the County Court to complete the transfer, the costs to be in the discretion of the County Court."

Solicitors: *Bell, Brodrick, & Gray*, for *E. W. Miles, Cowbridge; H. Wrentmore*, for *Spickett & Son, Pontypridd.*

G. I. F. C.

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June 20, 28.

BARNES *v.* SOUTHSEA RAILWAY COMPANY.

[1884 B. 2337.]

Railway Company—Notice to treat—"House"—Company taking part of a House to take the whole—Close—Private Road—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), s. 92 [*Revised Ed. Statutes, vol. ix., p.* 650].

A house and garden were surrounded by a wall. A gateway in the wall opened into a paddock surrounded by a high hedge of an ornamental kind. From the gateway the back road to the house passed through the paddock to a public road which ran along the far side of the paddock fence:—

Held, that the paddock was part of the house within sect. 92 of the *Lands Clauses Consolidation Act,* 1845.

IN 1874, the Plaintiff purchased a piece of freehold land in the parish of *Portsea, Southampton,* about 590 feet in length by 95 in breadth, and bounded on the east and west by public roads called respectively *Festing Road* and *Seymour Lane.* On this piece of land the Plaintiff built a dwelling-house for his own occupation, the front, with ornamental grounds and carriage drive, facing *Festing Road.* Part of the land at the rear of and immediately adjoining the house he laid out as a kitchen-garden, and the remainder of the land up to *Seymour Lane,* except a piece occupied by the private road hereafter mentioned, he retained as a pasture paddock, of rather less than half an acre in extent.

From the back of the house through the garden and paddock, the Plaintiff made a private road, opening through double gates of an ornamental character, into *Seymour Lane.* That part of the land occupied by the house, ornamental grounds, kitchen-garden and the portion of the private roadway within the latter,

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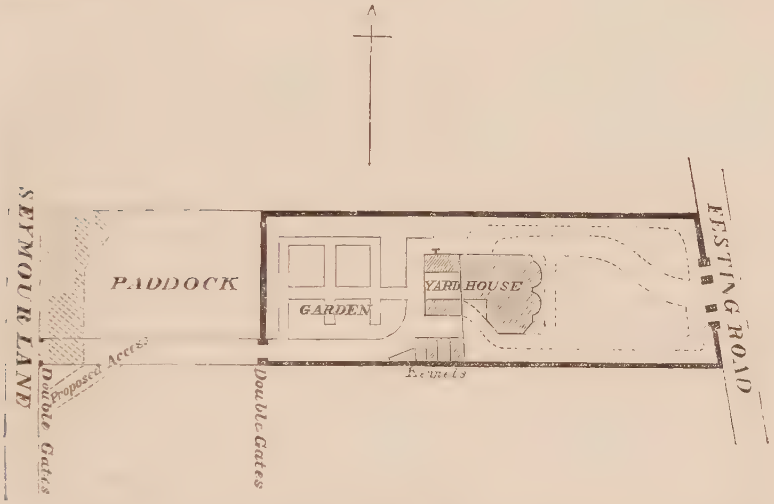
was inclosed by a wall with double gates for giving access along the private road. The remainder of the land, including the paddock, was inclosed on the north, south, and west sides by high hedges of an ornamental kind, except where it joined the wall of the kitchen-garden and except where the second double gates gave access to *Seymour Lane.*

The following is a plan of the Plaintiff's property, with lines added shewing a substituted access offered by the railway company.



On the 22nd of August, 1882, the Defendants, the *Southsea Railway Company*, served the Plaintiff with notice of their intention to take a piece of his land somewhat less than two roods in extent, being the end of the paddock and private road abutting on *Seymour Lane*, and thus to completely cut off the access to the lane from the house. This piece of land is shaded in the plan. The Plaintiff then served the company with a counter-notice, under sect. 92 of the *Lands Clauses Consolidation Act*, 1845, stating that the land mentioned in the notice to treat was part only of the land, buildings, and premises of which he was the owner in fee simple; that he was able and willing to sell the whole; and that he required them to purchase and take the whole. The company however, refused to take more than was comprised in their notice to treat, but offered to provide another access into *Seymour Lane* from the private road by an oblique cut across some adjoining land. They then gave notice of their intention to take proceedings to assess the amount of compensation in respect of the land comprised in the notice to treat, whereupon the Plaintiff commenced this action, and now moved for an injunction to restrain the company from taking further proceedings to assess the amount of such compensation, and from entering upon, or taking any other proceedings for the purpose of obtaining possession of, the land comprised in the notice.

The Plaintiff in his affidavit in support of the motion, stated that ever since his erection of the house he had retained the whole of the property comprised in his purchase in his own occupation, and that the paddock had always been used by him for the purposes and enjoyment of the house; that it was impossible to let it apart from the house; that the double gates opening into *Seymour Lane* were the only means of access for vehicles or horses to the paddock, kitchen-garden, and outbuildings at the rear of and appertaining to the house: that the private road had always been used by him for the purpose of carrying away the hay and grass from the paddock, and conveying from time to time heavy goods, such as manure, gravel, coals and furniture between the railway station and the house and kitchen garden, and removing ashes and other refuse; that it had been and was his intention to erect stabling for the house along that portion of the paddock fronting *Seymour Lane;* that it would not be possible, except at very great cost and injury to the property, to make any means of access for vehicles to the rear of the house from *Festing Road;* that the proposed substituted approach to *Seymour Lane* would be very inconvenient through its being slanting and not at right angles; and that the proximity of the railway would render the house less habitable.

In cross-examination the Plaintiff said he used the paddock only for the purpose of growing grass-crops; that he did not use the grass himself, but sold it, sometimes fresh and sometimes as hay; that the only way in which that part of the land containing the paddock was serviceable to the house was by providing a roadway, though this roadway was an indispensable adjunct to the

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house; that, although he had intended building stables on the paddock, he had always been ready to dispose of it, and had, in fact, placed it in the hands of an agent for that purpose, and that stables if built there would not be accessible for horses and carriages except by going round from a quarter to half a mile of public road.

Witnesses on behalf of the company suggested that in addition to the new accommodation road offered by the company, convenient access might be obtained to the back premises by constructing a road from the front carriage-drive to the rear of the house; but, on the other hand, the Plaintiff said this would involve the destruction of a considerable portion of the kitchen-garden, and materially alter the present arrangements and laying out thereof.

Marten, Q.C., and *Chadwyck Healey*, for the Plaintiff:—

The question is whether the piece of land the company desire to take is so essential to the Plaintiff for the convenient use and occupation of his house as to be comprised within the word "house" in sect. 92 of the *Lands Clauses Consolidation Act*, 1845, so that the company, in taking such piece of land, can be required to take the actual house itself, sect. 92 enacting, "That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

We submit that the case clearly falls within that section, for the word "house" is not necessarily confined to the building itself. According to Lord *Coke*, the word includes the "buildings, curtilage, orchard, and garden:" even "six acres of land may be parcel of a house:" Co. Litt. (1). [illegible] the paddock is less than half an acre. In *Grosvenor* v. *Hampstead Junction Railway Company* (2) it was held that where a company had given notice of their intention to take part of the land on which a building stood, although they did not propose to touch the actual building, they would be taking part of a house within the meaning of the section, and must be restrained from taking the land unless they took the whole. Again, in *Cole* v. *West London and Crystal Palace Railway Company* (1), it was held that gardens were part of the houses to which they were attached, and that the company, in taking parts of the gardens, were bound to take the houses also. *Marson* v. *London, Chatham, and Dover Railway Company* (2) and *Salter* v. *Metropolitan District Railway Company* (3) are also authorities in the same direction. In *Fergusson* v. *London, Brighton, and South Coast Railway Company* (4) the piece of land proposed to be taken by the company was separated by a road from the plaintiff's house and garden, which he insisted should also be taken by the company: it was held that the company were not bound to take the whole, on the ground that the piece of land being held for pleasure only, and not of necessity for the enjoyment and occupation of the house, it would not have passed by a conveyance of the "house" simply. In the present case, it is proved that the paddock and private road are necessary for the enjoyment and occupation of the Plaintiff's house. *Pulling* v. *London, Chatham, and Dover Railway Company* (5) affords another illustration of the distinction made where the land proposed to be taken is separated from the house itself, and is not used solely for the convenient enjoyment of the house. Apart from the question of the paddock, if we are deprived of our present convenient access to *Seymour Lane*, the result will be a most serious diminution of the enjoyment of the house.

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(1) 56 b.

(2) 1 De G. & J. 446.

Hemming, Q.C., and *Phipson Beale*, for the company:—

We submit that the piece of land we propose to take is not part of the Plaintiff's house within the 92nd section. The test, as settled by authority, is whether the paddock would pass by a conveyance of the house. This we submit it would not. The utmost that could pass by a conveyance would be a right of way over the road, and that is not enough to make the road part of the house within sect. 92. In the first place, it is not within the curtilage, which is the wall round the garden, the paddock being virtually separated from the house and garden, as the residential part of the property; secondly, the Plaintiff has admitted that the paddock is not really used in connection with the house at all, though the road is; and thirdly, the kind of traffic for which the private road is used can be just as well accommodated by the approach we propose to substitute for the existing entrance from *Seymour Lane.* The case falls within *Pulling* v. *London, Chatham, and Dover Railway Company* (1), which is even a stronger case. There the plaintiff-appellant contended that certain fields so far constituted part of his house, that the railway company, in taking portions of the fields, were bound to take the house also; and Lord Justice *Turner* said, in delivering judgment (2), "If, indeed, it is to be held that these fields are part of the appellant's house, I do not see why every part of a large park would not be entitled to be considered as part of the mansion standing in the park, and pass by a conveyance of the mansion. There would be no limit to the extent to which cases of this description might be carried." This is nothing more than a case of damage by severance, for which compensation is payable under sect. 63 of the *Lands Clauses Act;* the Plaintiff being also entitled to accommodation works under the *Railways Clauses Consolidation Act,* 1845. Upon the question of access, a landowner is not entitled to say that because the access to his house may be rendered somewhat inconvenient by the company's proposed works, therefore the company must take the house. It has never been held that taking a part of the back road to a house is taking part of the house. The compensation for this is given only by accommodation works and money payment.

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(1) 27 Beav. 242.
(2) Law Rep. 6 Eq. 101.
(3) Ibid. 9 Eq. 432.
(4) 33 L. J. (Ch.) 29; 33 Beav. 103.
(5) 3 D. J. & S. 661; 10 Jur. (N.S.) 665.

Marten, in reply.

BACON, V.C.:—

This case is, in itself, one of the utmost importance; because when the Legislature entrusts a railway company with certain powers to be exercised, beneficially, in some degree, for the public, but mainly for the profit and gain of the railway company, and when it gives a railway company the right to interfere with the lawful possession of the owner of property, all the provisions of

(1) 3 D. J. & S. 661; 10 Jur. (N.S.) 665

(2) 3. D. J. & S. 670.

the Act by which such powers and rights are conferred must be considered with the greatest strictness; for the Legislature, whatever it does, does not give away any man's property for the benefit and gain of another.

To my mind the clause in the Act is distinct, and the law is perfectly distinct. The Legislature, having to frame in words an expression which would cover the subject included in the clause, adopted this word "house," but not affecting to give any description of what a "house" means, because none was necessary. The word "house" had already acquired a legal signification. The passage which has been cited from Lord *Coke* is not new law in itself, although it is a very plain and distinct definition. The meaning of "house" is *domus*, residence, possession—what a man has when he talks about "having a house." The meaning of the word "house" in the Act of Parliament, therefore, is the meaning which Lord *Coke* ascribes to it in *Coke* upon *Littleton*, and it includes all that which may be called the *domus*.

In this case a man buys a piece of land, and he builds upon it a house. He incloses it partly with a wall, and partly with an ornamental hedge, and he makes it one entire, complete thing. To his house so constructed the entrance for visitors is on one side, and the entrance and the exit for the use and enjoyment of the house is on the other side; and for that purpose he, the owner of the house, has made a part of his piece of land into a roadway by which he carries away from his house all the refuse or all that needs be carried away, and by which he gets from the railway station coals, goods, and other necessaries; and that forms the entrance to the backyard of his house. Then the railway company say they have a right to take part of his land and road away from him. A notable suggestion is made that, by taking somebody else's land, the company could still give him an entrance to this road of his. The Plaintiff declines that: He says, "My house is that which I have inclosed by a wall and a sufficient boundary, and I will not suffer you to destroy my enjoyment and my possession of my property by taking part of it away: If you have power to take the whole, take it; but if you take any part you must take the whole." The law is clearly and distinctly laid down in the cases that have been referred to. In *Pulling* v. *London*,

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Chatham, and Dover Railway Company (1), which was relied on by the Defendants, the facts differ from those in the case before me, but the observations of Lord Justice *Turner* in dealing in his judgment with the law of the case are entirely opposed to the Defendants' contention, and appear to me to cover the present case. The Lord Justice says (2): "In my judgment the land taken by the Respondents for their railway is not part of the appellant's house within the meaning of the 92nd section of the *Lands Clauses Consolidation Act*, 1845. It would not, as I think, pass by a conveyance of the house." Can that be said here? The learned Judge in dealing with the facts proved before him—the comparatively recent acquisition of one field, the use that was made of it, and the other facts in that case—came to the conclusion that the parcel there in question would not pass by a conveyance of the house, which cannot be said in this case. The conveyance of the house must, in my opinion, include the way leading from the back of the house. Then Lord Justice *Turner* goes on to say, "The house and the field (the *Shoulder of Mutton Field*), had, it appears, up to that time been separately occupied, and the field is separately demised by the lease. It is even more clear that *Bank's* field could not have been part of the house until the lease of it to the appellant was granted. What has been done since these fields were demised to the appellant is not, in my opinion, sufficient to have made them part of the appellant's house. It is one thing whether they are part of the grounds connected with the house; another whether they are part of the house itself and would pass by a conveyance of it. They are described in the appellant's evidence as pleasure-grounds. For the reasons which I assigned in *Fergusson* v. *London, Brighton, and South Coast Railway Company* (3), I doubt whether, even if they were entitled to that description, they could be considered as part of the appellant's house within the meaning of the 92nd section. But I think it is going too far to call these fields pleasure-grounds. They seem, indeed, to be occasionally used for the purposes of pleasure; but looking to the purposes of pleasure, for which, according to the evidence,

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(1) 3 D. J. & S. 661; 10 Jur. (N.S.) 665.

(2) 3 D. J. & S. 669.

(3) 3 D. J. & S. 653.

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they have been used, they can only have been so used at some seasons of the year." Here, every day of the 365 the Plaintiff had and enjoyed the right of fetching his coals and other commodities from the railway station, and had used the road for the domestic purposes of his house. Then the Lord Justice says further, "If, indeed, it is to be held that these fields are part of the appellant's house, I do not see why every part of a large park would not be entitled to be considered as part of the mansion standing in the park, and pass by a conveyance of the mansion."

In my opinion the present case falls clearly within the 92nd section. The Plaintiff can only be deprived of the possession of this house of his upon the terms prescribed by the Act: that is to say, if the railway company want any part of it they must take the whole of it. There must therefore be an injunction in the terms of the notice of motion, with costs.

Solicitors: *Sole, Turner, & Knight,* agents for *Blake, Rede, & Lapthorn, Portsea; Bircham & Co.*

G. I. F. C.

V.-C. B.
1884
July 25, 26.

In re DONALDSON.

Taxation — Mortgage — Mortgagor and Mortgagee — Trustee — Solicitor — Profit Costs.

Where one of a body of mortgagees is a solicitor and acts as such in enforcing the mortgage security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not.

If in such a case the mortgagor, in applying for an order to tax the bill of the solicitor-mortgagee, desires to raise the objection to profit costs, he should state his objection in his petition for taxation.

ADJOURNED SUMMONS.

On the 5th of February, 1881, an estate near *Ipswich,* called "the *Hill House* estate," was mortgaged, by way of transfer, by a Miss *Sarah Ann Farrant Walter* to Messrs. *Brown & Donaldson,* solicitors, as security for £3700 and interest; and on the same day another neighbouring property, called "the *Belle Vue* estate," was mortgaged, also by transfer, by Miss *Walter* to Colonel

Hibbert and Mr. *Donaldson* as security for £4300 and interest. In both cases the money advanced was trust money.

In July, 1881, on account, it was said, of the insufficiency of the security, Miss *Walter* received notice to pay off £1600, part of the £4300 secured on the *Belle Vue* estate.

The £1600 was not paid; and the mortgagees then endeavoured to sell the *Belle Vue* estate by auction, but without success. Mr. *Donaldson* subsequently delivered to Miss *Walter* a bill of fees and disbursements relating to this business, amounting to £198 16*s.* 5*d.*, besides £36 0*s.* 6*d.* for auctioneers' charges.

In January, 1882, Miss *Walter* received notice to pay off the £3700 secured on the *Hill House* estate, and, default having been made in payment, that estate was sold. For this business Mr. *Donaldson* delivered to Miss *Walter* two bills of fees and disbursements amounting to £185 10*s.* 9*d.*, and £18 4*s.* 8*d.*, besides auctioneers' charges.

In February, 1884, Miss *Walter* obtained the common order to tax the three bills of £198 16*s.* 5*d.*, £185 10*s.* 9*d.*, and £18 4*s.* 8*d.*

On the taxation Miss *Walter* objected to certain items in the bills, representing Mr. *Donaldson's* professional charges, on the following grounds:—

(1). Because *Donaldson* being one of the mortgagees under the mortgages in respect of which the costs were charged, was not entitled to charge profit costs in respect thereof, or any other costs than costs out of pocket; and (2). Because the mortgages were taken by *Donaldson* as a trustee, and as an investment of trust money, and he was therefore not entitled to charge profit costs in respect thereof, or any other costs than costs out of pocket.

The Taxing Master upon this made a separate certificate, in which he said, "I was of opinion that the rule that a trustee may not make a profit of his trust, and therefore that a solicitor-trustee may not charge any but costs out of pocket does not apply to the case of a mortgagor taxing the costs of his mortgagee, where there is no relation between them but that of mortgagor and mortgagee. If the beneficiaries of the money lent to the mortgagor were taxing the bill, the rule would no doubt apply, and I must have allowed the objection; but in this case the trust fund will not in any way be diminished, and the persons interested in that fund will not suffer by my allowing to the solicitor profit costs. It was suggested on behalf of the applicant that the security may not be sufficient to pay the principal and interest and profit costs; but if so, my decision in this case will not prevent the beneficiaries taxing the bill of costs on the principle contended for." Accordingly the Master disallowed the objections.

Miss *Walter* then took out the present summons to have the objections allowed, and to vary the certificate accordingly.

The summons was dismissed by the Chief Clerk with costs, but was adjourned into Court at the applicant's request.

It was stated in the course of the argument, though there was no evidence on the point, that the settlements of the trust funds secured by the two mortgages expressly authorized a solicitor-trustee to charge for professional services.

Hemming, Q.C., and *Baines*, for the summons:—

Apart from the fact that the money advanced in this case was trust money, the question is whether a solicitor-mortgagee is entitled to make profit charges in the matter in which he is mortgagee. The rules in cases where a solicitor is a mortgagee or trustee, appear to be as follows: first, where a solicitor is one of a body of mortgagees and acts as solicitor in the matter of the mortgage, he cannot charge against the mortgagor more than costs out of pocket; and, secondly, where a solicitor is one of a body of trustees and acts as solicitor in the matter of the trust, there again, on the ground of the relation subsisting between *cestuis que trust* and trustees, he cannot charge for more than costs out of pocket unless he is expressly empowered to do so by the instrument creating the trust: *Broughton* v. *Broughton* (1). With regard to the first point, we submit it is the settled rule that a solicitor-mortgagee cannot charge for professional services, and is only entitled to his costs out of pocket: *Sclater* v. *Cottam* (2); *In re Taylor* (3).

In taxing a solicitor's bill under the third-party clause of the

(1) 5 D. M. & G. 160.
(2) 3 Jur. (N.S.) 630.
(3) 18 Beav. 165.

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Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38, the same rules apply whether the taxation is asked for by the mortgagor or the mortgagee: *In re Jones* (1); *Re Baker* (2).

Marten, Q.C., and *Farwell*, for *Donaldson* :—

We submit that upon principle a solicitor-mortgagee should be entitled to charge profit costs. In the first place, a mortgagee is always entitled to be paid his principal, interest, and costs; and, in the second place, in an action for redemption or foreclosure, a mortgagee, even though he be a solicitor, is entitled to his full profit costs of the action. The only authority cited on behalf of the applicant which has any bearing on the present question is that of *Sclater* v. *Cottam* (3); but that case, so far as it purports to lay down any rule, is certainly opposed to more modern authority.

In the very recent case of *London Scottish Benefit Society* v. *Chorley* (4), in which *Sclater* v. *Cottam* was cited, and where the question was as to the right of a solicitor to his profit costs of successfully defending an action in person, Mr. Justice *Denman* says (5): "I am not aware of any principle which ought to prevent a successful party who is a solicitor and who does solicitor's work, from being indemnified . . . for the pains, trouble and skill which he has to incur and to exercise in order to bring it to a successful conclusion. . . . The solicitor's time is valuable; he applies his skill to a suit or action in which he is obliged to spend his time and exercise his skill in consequence of the wrongful act of his opponent; and therefore it is not an unreasonable view that the word 'costs,' in the sense of an 'indemnity,' should be held fairly to include a reasonable professional remuneration for that work which, if he did not do it himself, would have had to be done by another solicitor and paid for by his unsuccessful opponent." And Mr. Justice *Manisty* says (6): "Time is money to a solicitor; and why should he not be as much entitled to his proper costs, if he affords the time and skill which he brings to bear upon the business where he is a party to the action as he is where he is not a party?" And Mr. Justice *Watkin Williams* expresses himself to the same effect (1). The decision of the Divisional Court in that case allowing the defendant-solicitor the same costs as if he had employed a solicitor has been affirmed by the Court of Appeal (2). It may therefore be now considered settled that a solicitor who acts for himself in any action or matter is entitled to receive, under the name of "costs," a proper compensation for the expenditure of his time and skill. In *Price* v. *M'Beth* (3), a redemption suit, Vice-Chancellor *Stuart*, while disclaiming any intention to decide whether or not a solicitor who acted for himself as a mortgagee in such a suit was, as a matter of course, entitled to have his ordinary profit costs of the suit, affirmed the decision of the Taxing Master allowing the mortgagees, who were solicitors and had acted for themselves in the suit, their profit costs. The Taxing Master, in giving his reasons for his decision in that case, said, "A solicitor acting for himself as plaintiff or defendant in a suit has always been allowed his profit costs as if he had acted for others, except in the case of a solicitor acting for himself as trustee. A mortgagee until he is paid is not a trustee, but a creditor. . . . In *Sclater* v. *Cottam* (4) the decision was, not that the solicitor-mortgagee should not have his profit costs in that suit, but that he should not have profit costs for defending two other suits, which costs he claimed in the nature of just allowances to him as a mortgagee." *Sclater* v. *Cottam* is therefore a different case from the present. If a mortgagee is entitled to his costs as a creditor, why should he be asked, simply because he is a mortgagee, to make a present to his debtor of his time and labour? It is the everyday practice for solicitors to lend money as mortgagees and get their full costs. A mortgagee is undoubtedly entitled to employ a solicitor to act in the matter of the mortgage, and can obtain from the mortgagor the full costs so incurred; and there seems no reason, in principle, why, if the mortgagee is a solicitor, he should not act in the matter himself and be paid the usual profit costs. In fact, in such a case the mortgagor gets an actual benefit, since there are many items for which a solicitor-mortgagee cannot charge: for instance, he cannot charge attendances against himself. The question of the solicitor's right to charge in his position as trustee does not arise in the present case, which is one solely between mortgagor and mortgagee, and not between *cestuis que trust* and trustee.

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(1) 8 Beav. 479.
(2) 32 Beav. 526.
(3) 3 Jur. (N.S.) 630.
(4) 12 Q. B. D. 452.
(5) Ibid. 455.
(6) Ibid. 457.

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(1) 12 Q. B. D. 460.
(2) 13 Q. B. D. 872.
(3) 33 L. J. (Ch.) 460.
(4) 3 Jur. (N.S.) 630.

We submit that this application is misconceived, and should be dismissed with costs.

Hemming, in reply:—

I submit that *Sclater* v. *Cottam* (1) is exactly in point. That case, which was decided as long ago as 1857, has never been overruled, and is cited as an authority in all the text-books of the present day: *Coote* on Mortgages (2); *Fisher* on Mortgages (3); *Seton* on Decrees (4); and *Morgan & Davey* on Costs (5). The rule so laid down and recognised applies even if the mortgage money is not a trust fund, but here it is trust money. As regards the *London Scottish Benefit Society* v. *Chorley* (6), the point which was there treated as doubtful at Common Law, has, as the above text-books shew, never been doubted in Chancery since *Sclater* v. *Cottam*. Moreover, the Judges in the *London Scottish Case* do not in any way refer to *Sclater* v. *Cottam;* it was not in fact necessary for them to do so, since the question before them was not as to the right of a solicitor-mortgagee to profit costs, but as to the right of solicitors to charge for profit costs in an action which had been brought against them personally and which they had successfully defended.

BACON, V.C.:—

In this case, which is one relating to the practice of the Court on a question of taxation, I am asked to override the decisions of the Taxing Master and the Chief Clerk, officers of the Court versed in matters of taxation and in the principles by which those matters are regulated.

The cases that have been referred to on behalf of the applicant have no application to the] case now before me. *Sclater* v.

(1) 3 Jur. (N.S.) 630.

(2) 4th Ed. p. 798.

(3) 4th Ed. p. 923, n.

(4) 4th Ed. p. 1061.

(5) 2nd Ed. by Morgan and Wurtzberg, p. 390.

(6) 12 Q. B. D. 452.

Cottam (1), which was strongly relied upon, was a very special case; it is one of much complication, and has really very little relation to the present question, and therefore I cannot say that it should be regarded as an authority disposing of this case.

There is no rule more true, more well-established, or more familiar than that a trustee is not entitled to make a profit out of his trust, though he is entitled to the costs incurred by him in the exercise of his trust; but it appears to me that this rule has no application to the present case, because the Respondent Mr. *Donaldson* is not a trustee for the Applicant. Trustees are obliged to protect their trust property and must of necessity frequently employ a solicitor for that purpose, and they are entitled to the costs they have so incurred. If I accede to Mr. *Hemming's* argument, I shall be obliged to decide that in a case where a separate solicitor is not employed, and a solicitor is both trustee and mortgagee, he cannot, under any circumstances, be entitled to his costs of acting as solicitor for himself and his co-trustees. For that proposition no authority has been cited; but there is authority for the proposition that a solicitor acting for himself has a right to charge for his costs. Now here are trustees acting in their trust, and having advanced money on mortgage in pursuance of their trust proceed to realize their security. One of these trustees is a solicitor. Being trustees they are entitled to employ a solicitor, and they employ one of themselves as such. Because that one trustee happens to be a solicitor I am asked to direct the Taxing Master to disallow the costs which have been incurred through his having been employed as solicitor. That I cannot assent to. I cannot allow that when a solicitor happens to be a trustee he is to be treated as for the time being suspended from practice or struck off the rolls so far as regards the matter in which he is a trustee. I do not think a solicitor is to be deprived of civil rights because he is a trustee. If he were a sole surviving trustee, and had to file a bill for foreclosure of mortgaged property, it could not be said he was not entitled to the costs of the suit; on the contrary, he would be entitled to all his costs.

Now what are the facts here? Certain mortgagees enforce their securities against their mortgagor. One of the mortgagees, Mr. *Donaldson*, who is a solicitor, does the solicitor's work in the

(1) 3 Jur. (N.S.) 630.

matter and charges the mortgagor with profit costs for the work so done. The matter comes before the Taxing Master, when the mortgagor objects that Mr. *Donaldson* is not entitled to charge profit costs in respect to the mortgages or any other costs than those out of pocket. The Taxing Master then makes a certificate answering the objections as follows:—[His Lordship read the certificate and continued:—] I cannot say that that is wrong. I know of no principle requiring me to say that the items in question are wrongly charged. The case of *London Scottish Benefit Society* v. *Chorley* (1) shews clearly that a solicitor is entitled to charge as a solicitor for costs in an action to which he is a party. I cannot therefore disaffirm the decision at which the Taxing Master has arrived. Another circumstance which is against the Applicant's present contention is this. A mortgagor has the right, in the commonest form possible, to have his bill taxed, but if his intention is to raise objections to the bill such as have been raised and argued at great length in this case, he should state them in his petition for taxation. If then the present Applicant had stated her objections in her petition, the Respondent could have at once obtained the decision of the Court upon the point. But she had obtained only the common order for taxation which does not apply to such a case as this. In my opinion this application is not only too late and irregular in form, but also contrary to the principles which govern this case. *In re Taylor* (2) was a case of agency and is quite different from the present case. There the solicitor-mortgagee employed another solicitor to act as his agent in the matter of the mortgage, and it was held that the agent's bill could be taxed only as between solicitor and agent and not as between solicitor and client.

As a matter of principle I entertain no doubt about this case, and therefore I affirm the decisions of the Taxing Master and the Chief Clerk. If my decision is wrong it must be set right elsewhere.

Solicitor for Applicant: *J. W. Smart.*
Solicitors for Respondent: *Brown & Woolnough.*

(1) 12 Q. B. D. 452. (2) 18 Beav. 165.

G. I. F. C.

V.-C. B.
1884
Aug. 4.

In re PRICE.
LEIGHTON *v.* PRICE.

[1884 P. 372.]

Settled Estate—Infant—Trustees—Sale out of Court—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 59, 60.

In appointing trustees under the *Settled Land Act*, 1882, to sell an infant's estate (ss. 3, 59, 60), the Court has jurisdiction to authorize the sale to be made out of Court.

ADJOURNED SUMMONS.

The Defendant, who was an infant, had become entitled under the will, dated in 1883, of the testatrix in the action, to a copyhold estate called "*Wraxhall House*," in *Gloucestershire;* and he now applied, by his next friend, by a summons in the action and under the *Settled Land Act*, 1882, that two named persons might be appointed trustees under the will for the purposes of the Act; that the powers conferred upon a tenant for life by the Act might be exercised by such trustees on behalf of the infant during his minority; that the trustees might sell the estate, invest the net proceeds, and pay the income to the guardian of the infant for his maintenance.

It appeared from the evidence that the house required a sum equivalent to about one-third of its value to be expended in repairs, but that there were no funds available for the purpose.

Rawlinson, for the summons, pointed out that the application was made under sects. 3, 59, 60 of the *Settled Land Act*, 1882, and asked that, under the circumstances and to avoid expense, the trustees, when appointed, might be at liberty to sell the property out of Court.

BACON, V.C.:—

I am satisfied with the evidence, and that the proposed sale will be for the benefit of the infant. You may take an order in

V.-C. B.
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the terms of the summons, and the trustees may sell the estate out of Court.

Solicitors: *Merediths & Co.*, agents for *Ticehurst & Sons, Cheltenham.*

G. I. F. C.

V.-C. B.
1884
Aug. 5.

In re HOUSEHOLD.
HOUSEHOLD *v.* HOUSEHOLD.

[1884 H. 2543.]

Investment of Personal Estate to cultivate Real Estate.

The trustees of real and residuary personal estate devised and bequeathed in trust for *A.* for life, with remainder to his children, who were infants (there being no investment clause in the will) were authorized to advance to the tenant for life part of the residuary personal estate for the purpose of stocking and cultivating a farm forming part of the real estate, on evidence that the outlay would be to the advantage of the infant remaindermen.

ADJOURNED SUMMONS.

Robert Barrows Household, by his will dated in October, 1881, after appointing the Plaintiffs, his son, *Robert Henry Household* and *Somerville Arthur Gurney* his executors, devised to them all his real estate upon trust to pay thereout certain annuities to his two daughters, and, subject thereto, upon trust for the Plaintiff, *R. H. Household*, during his life, with remainder to his children. And the testator bequeathed his residuary personal estate to his trustees upon the same trusts as the real estate, except as to the annuities, which he charged upon his real estate exclusively. The will contained no investment clause.

The testator died in November, 1881, possessed of considerable real estate, and his residuary personal estate amounted to about £11,000. Upon his death his son, the Plaintiff, *R. H. Household*, with the assent of his co-trustee, undertook the principal management of the real estate. Part of the real estate consisted of the "*White House Farm*" in the county of *Norfolk*, comprising about 320 acres, partly pasture and partly arable. At Michaelmas, 1883, this farm became vacant in consequence of the expiration of a lease which had been granted by the testator. The Plaintiff, *R. H. Household*, thereupon endeavoured to re-let the farm, but, owing to the prevailing agricultural depression, he was unable to find a tenant at a remunerative rent. To prevent the farm going out of cultivation, and so becoming deteriorated in value, he proposed to manage and cultivate it himself, provided he could obtain some assistance from the testator's residuary personal estate. As the will did not in terms authorize any such expenditure, he and his co-trustee took out this originating summons, under Rules of Court, 1883, Order LV., rule 3 (f), asking that they, as trustees of the will, might be at liberty, out of the testator's residuary personal estate, to advance to him, the Plaintiff, *R. H. Household*, the tenant for life, the sum of £1000, on the security of his bond to be given to his co-trustee, he the said *R. H. Household* undertaking to expend the money in stocking, farming, and cultivating the farm to the satisfaction of his co-trustee.

The application was supported by affidavits to the effect that *R. H. Household* was willing to devote the necessary time and attention towards the stocking, farming, and cultivation of the farm, provided he and his co-trustee were authorized by the Court to expend the £1000 for that purpose; that he was willing to make himself personally responsible for the repayment of the money to the trustees for the time being of the will; and that the advance and expenditure, in addition to the capital employed by himself, would be greatly to the advantage of the trust estate.

R. H. Household had two children, who were infants and Defendants to the action.

His sisters, the annuitants, were still living.

Marten, Q.C., for the Plaintiffs :—

The difficulty arises in consequence of the will containing no power to manage and cultivate, or to expend money for such purposes. But even though it may not be authorized by the terms of the will, an outlay for the purpose of maintaining and keeping up the value of the trust estate will be authorized by the Court, provided it is shewn by sufficient evidence that such an outlay is necessary and to the advantage of the infant *cestuis que trust*: *Umbleby* v. *Kirk* (1); *In re Jackson* (2). The evidence

(1) Cooper, C. P. 1838, 254.

(2) 21 Ch. D. 786.

in this case appears sufficient to justify the Court in making the order.

Bardswell, for the Defendants.

BACON, V.C., said he was satisfied from the evidence that the proposed outlay would be to the advantage of the trust estate, and accordingly made an order as asked, on *R. H. Household* by his counsel undertaking to expend the £1000 as mentioned in the summons. The costs of all parties as between solicitor and client to be paid by the Plaintiffs, the trustees, out of the trust estate.

Solicitors: *Burton, Yeates, Hart, & Burton*, for *Coulton & Son, Lynn*.

G. I. F. C.

In re MONCKTON AND GILZEAN.

V.-C. B.
1884
Aug. 6.

Vendor and Purchaser—Contract for Sale—Conditions of Sale—Right to rescind—Purchase-money—Deposit—Separate Account—Interest.

On a sale of a freehold house by auction one of the conditions of sale provided that "all objections and requisitions in respect of the title, or the abstract, or particulars, or anything appearing therein respectively shall be sent to the vendors' solicitors within fourteen days from the delivery of the abstract, and all objections and requisitions not sent in within that time shall be considered to be waived. If any objection or requisition shall be made and insisted on, which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty by notice in writing to rescind the sale." The purchaser accepted the vendors' title as shewn by the abstract and sent them a draft conveyance for approval. The vendors then required that the conveyance should be taken subject to certain "covenants, conditions, and restrictions," the nature of which they did not explain, but which, they alleged, were contained in a deed recited in an abstracted deed forming the commencement of title. As the abstract did not shew the existence of any such covenants, conditions, or restrictions, and as the conveyance to the vendors' immediate predecessor in title did not in any way refer to them, the purchaser declined to take a conveyance subject to them without, at all events, being first informed of their nature, whereupon the vendors wrote purporting to rescind the contract:—

Held, upon a summons by the purchaser under the *Vendor and Purchaser Act*, 1874, that the vendors had no power to rescind, and that the

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purchaser was entitled to a conveyance without the insertion of the words required by the vendors.

Another condition of sale provided for payment of a deposit and for the completion of the purchase on a certain day; and that "if from any cause whatever," the purchase should not be completed on that day the purchaser should pay interest at 5 per cent. per annum on the remainder of his purchase-money until completion. After receiving the vendors' notice of rescission the purchaser, on the day fixed for completion, placed the balance of her purchase-money to a separate account on deposit with a bank at 2½ per cent. interest, and gave notice of the deposit to the vendors:

Held, that the purchaser could not, under the circumstances, be required to pay, on actual completion, higher interest than that allowed by the bank.

ADJOURNED SUMMONS.

On the 2nd of April, 1884, the trustees of the will of *William Monckton*, deceased, put up for sale in lots by auction two semi-detached freehold houses in *Clifton Park, Bristol*, known as *Amherst House* and *Colchester House*, subject to certain conditions of sale.

These conditions provided for payment by the purchaser of either lot of a deposit of £10 per cent. on his purchase-money; for the completion of the purchase on the 24th of June then next, and that "if from any cause whatever the purchase of any lot shall not be completed on that day the purchaser thereof shall pay to the vendors interest after the rate of £5 per cent. per annum on the remainder of the purchase-money until the completion of the purchase": also that the vendors would within fourteen days from the day of sale deliver to the purchaser an abstract of title, such title to commence with two indentures dated respectively the 9th of October, 1848.

Then followed a condition in the following terms:—

"VII. All objections and requisitions in respect of the title, or the abstract, or particulars, or any appearing therein respectively, shall be stated in writing and sent to the vendors' solicitors within fourteen days from the delivery of the abstract, and all objections and requisitions not sent in within that time shall be considered to be waived. If any objection or requisition shall be made and insisted on, which the vendors shall be unable or on the ground of expense or otherwise shall be unwilling to remove or comply with, the vendors shall be at liberty (notwithstanding any intermediate negotiation in respect thereof, or attempts to remove or comply with the same) by notice in writing to the purchaser by whom such objection or requisition shall be made, or his solicitor, to rescind the sale, in which case the purchaser shall receive back the deposit without interest or costs; but the purchaser may, within seven days after receiving the notice to rescind, withdraw the objection or requisition, in which case the notice to rescind shall be deemed to be withdrawn also."

Condition 8 provided for the execution of proper assurances to the purchasers, such assurances to be prepared by and at the expense of the purchasers.

At the sale *Colchester House* was knocked down to Mrs. *Margaret Gilzean*—who was occupying the house as a sub-tenant—for £2000, and thereupon she paid a deposit of £200. *Amherst House* was not sold.

On the 7th of April the vendors' solicitors delivered to the purchaser's solicitors an abstract of title commencing with the two indentures of the 9th of October, 1848, as mentioned in the conditions.

The abstract of the first of these two indentures contained a recital of a prior deed of the 25th of November, 1842, whereby a close of land, of which the two plots at present containing *Amherst House* and *Colchester House* then formed part, was conveyed to *George Rooke Farnall* upon trust for sale for building purposes, and to create rent-charges thereout: and also a recital of a deed of the 31st of August, 1846, whereby *Farnall* conveyed the two plots to *John Kemp* in fee subject to a rent-charge of £15 thereby created out of each of the two plots in favour of *Farnall*, *Kemp* covenanting with *Farnall* to build a house on each plot within twelve months, which was done, and to duly pay the rent-charges, a power of entry for non-payment being reserved to *Farnall*. By the deed of 1848 containing these recitals the two plots, with the two houses which had then been built thereon, were conveyed to *William Monckton* in fee, "subject to the payment of the said two annual sums of £15 each reserved and made payable out of the said hereditaments by the said indenture of the 31st of August, 1846."

By the second indenture of 1848 the two rent-charges were conveyed to a trustee for *William Monckton*.

William Monckton died in 1874, having by his will devised *Amherst House* and *Colchester House,* and the ground rents issuing thereout respectively, after the death of his widow, to the present vendors in trust for sale.

The testator's widow having died in 1883, his trustees put up for sale, as above-mentioned, the two plots of ground and the houses thereon, but no mention was made of the rent-charge in the particulars or conditions of sale, it being apparently considered that as the houses and the rent-charges both formed part of the testator's estate, the rent-charges should be treated as passing with the houses to the purchasers of the latter.

No requisitions on the title to *Colchester House,* beyond such as were of an ordinary character, having been made on behalf of Mrs. *Gilzean,* the purchaser, within the fourteen days prescribed by the conditions of sale, the purchaser's solicitors duly accepted the title, and on the 6th of June sent a draft conveyance to the vendors' solicitors for approval.

By the first operative part of the draft the vendors purported to convey the house to the purchaser " subject to a yearly rent-charge of £15 created by an indenture dated the 31st day of August, 1846 "—being the indenture of that date above referred to—" and to all powers and remedies for enforcing payment thereof." Then by the second operative part the rent-charge was, to prevent merger, conveyed to a trustee for the purchaser.

Subsequently, on the 16th of June, the vendors' solicitors wrote to the purchaser's solicitors requiring that the house should be conveyed subject, not only to the rent-charge, but also " subject to the several covenants and conditions, restrictions and agreements in the said indenture of the 31st of August, 1846, contained," but not stating what they were.

The purchaser's solicitors then, on the 19th of June, wrote to the vendors' solicitors asking for " a full copy of such restrictions, the abstract of title being imperfect without it." On the following day the vendors' solicitors replied that unless the purchaser was prepared to complete on the terms of their former letter they would rescind the contract and return the deposit.

The purchaser's solicitors, however, declined to accept a conveyance, except in the form they had prepared, whereupon, on the 23rd of June, the vendors' solicitors wrote to the purchaser's solicitors rescinding the contract, and returning the deposit. On the same day the purchaser took out a summons under the *Vendor and Purchaser Act*, 1874, to have it declared that she was entitled to a conveyance of the house and rent-charge in the form of the draft prepared by her solicitors.

On the following day the purchaser's solicitors returned the cheque for the deposit to the vendors' solicitors. The vendors subsequently received notice that the purchaser had, on the 24th of June, the day fixed by the conditions for the completion of the purchase, placed £1800, the balance of her purchase-money, to a separate account at a bank on deposit at 2½ per cent., and that she would not pay the vendors any interest beyond that allowed by the bank.

It was stated in the course of the argument that the "restrictions," to which the vendors desired that the conveyance should expressly refer, were of an onerous nature, and such as are sometimes attached to building estates.

The summons having been adjourned into Court, now came on for argument.

Marten, Q.C., and *G. I. Foster Cooke*, for the purchaser:—

First, as to the form of the conveyance. We submit that we are entitled to have the house conveyed subject only to the rent-charge, which is the form in which the vendor's testator, *W. Monckton*, took his conveyance, and that the vendors have no right to require the conveyance to be made subject to the covenants and restrictions contained in the deed of 1846, inasmuch as neither the vendors nor their testator held under a conveyance in that form: nor did the recital of the deed of 1846, in the conveyance to *W. Monckton*, in any way shew that it contained any covenants beyond a covenant to pay the rent-charge and to build a house, which has been done. Moreover, the vendors are not under such personal liability to any covenants contained in the deed of 1846 as to render it necessary for their protection to refer to those covenants in our conveyance.

Secondly, we submit that, under the circumstances, the vendors had no power to rescind the contract under the 7th condition; for, in the first place, we have not made any "objection or requisition" at all: we have only asked for a copy of the alleged covenants and restrictions contained in the deed of 1846. But even if we can be said to have made a "requisition," it is a requisition on the draft conveyance—not on the title; and the vendors can rescind only on a requisition made on the "title, or the abstract, or the particulars." The conveyance is not referred to in the 7th condition at all: in fact, the preparation and execution of the conveyance form the subject of a separate condition—the 8th. Moreover, under the *Conveyancing and Law of Property Act*, 1881, sect. 3 (3), we were precluded from making any requisition on the recited deed of 1846, and were bound to assume that it was correctly recited. Then, again, the vendors can only rescind in respect of a requisition made—and not only made but "insisted on"—within the fourteen days, the power of rescission being reserved as a protection to the vendors against any requisition made within that period—and within that period only—which they may be unable or unwilling to "remove or comply with." In any case, the vendors were not entitled to rescind without giving us an opportunity of withdrawing any objection or requisition we might have made, as provided by the condition: *In re Jackson & Oakshott* (1), and, indeed, it is contrary to principle that a vendor should be allowed to exercise his power of rescission where he has withheld from the purchaser information which ought to have been disclosed: *Nelthorpe* v. *Holgate* (2); or without attempting first to answer the requisition: *Greaves* v. *Wilson* (3); *Turpin* v. *Chambers* (4); *In re Jackson & Oakshott.*

In point of fact, upon the abstract as delivered, the covenants and restrictions now referred to by the vendors could not be made the subject of any requisition at all, and not being capable of being inquired into cannot fall within the 7th condition: *In re Jackson & Oakshott* (5).

Again, assuming that these "covenants, conditions, and restrictions," relate in some way to the user of the land, they may possibly be such as to constitute a fatal objection to the title, as in *In re Higgins' and Hitchman's Contract* (1). In that case the vendors, in not disclosing the defect, have failed to deliver, as they were bound to do, a "perfect abstract." Accordingly, the time for sending in requisitions has not yet begun to run, and the power of rescission has therefore never arisen at all: *Dart's* Vendors and Purchasers (2).

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(1) 14 Ch. D. 851.
(2) 1 Coll. 203.
(3) 25 Beav. 290.
(4) 29 Beav. 104.
(5) 14 Ch. D. 851, 854.

Millar, Q.C., and *Ingle Joyce*, for the vendors:—

The vendors are trustees and can only convey such estate as they themselves hold.

The property is held by them subject to the conditions and restrictions in question, which in fact are such as are usually found in conveyances of building estates and relate to the user of the land, and therefore they are entitled to require that any conveyance from them shall be taken in that qualified form and not in a form implying that there are no existing conditions or restrictions. Then, as to our right to rescind, it is, we submit, upon the words of the condition, an absolute right arising where "any" objection or requisition is made which we are unable or unwilling to remove or comply with. By the letter of the 19th of June the purchaser "made" a requisition, and has, by taking out this summons, "insisted on" that requisition. Accordingly upon the terms of the condition our right to rescind is clear. As your Lordship observed in the recent case of *In re Dames and Wood* (3), "no matter how unreasonable, however provocative, the requisitions may have been, the question was simply one of the construction of the condition." *In re Great Northern Railway Company and Sanderson* (4), is another authority in favour of the absolute right of a vendor to rescind under such a condition as this.

[BACON, V.C.:—That case has no bearing whatever upon the present.]

If the restrictions are a "fatal objection" to the title, the objection is one we are "unable to remove or comply with," and therefore gives us the right to rescind.

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(1) 21 Ch. D. 95.

(2) 5th Ed. pp. 126, 161, 162.

(3) *Ante*, pp. 172, 176.

(4) 25 Ch. D. 788.

BACON, V.C.:—

In this case the owners of an estate put up for sale a freehold house forming part of that estate, subject to certain conditions of sale of a most ordinary kind. Under those conditions the vendors have reserved a right to rescind the contract if any requisition is made which they are unable or unwilling to comply with.

Now there is no pretence for saying that the letter of the 19th of June is a requisition. The vendors deliver an abstract and protect themselves against being called upon to shew a title earlier than the year 1848, a good long title in the present day, and they then further protect themselves against requisitions on the title as shewn by the abstract by the words of the 7th condition, which is as follows:—[His Lordship read it and continued:—]

If the condition had provided for any requisition whatever that might be made which the vendors should be unable or unwilling to comply with, something might be said, but here there is no such thing.

No requisitions on the title are made and insisted on; the time for making requisitions expires; that which is described in the abstract the vendors are shewn to be able absolutely to convey, and the purchaser is entitled to have the property conveyed to her upon the title so made. After some correspondence it comes out that there is a clause or covenant in the original conveyance of the contents of which no one has informed me, though I understand from Mr. *Millar* that it is of the usual restrictive nature of covenants affecting building estates: at all events one can easily guess that it is a clause or covenant restricting in some way the user of the land. If so, the restrictions run with the land; and whoever has the land is bound by those restrictions.

The vendors cannot sell free from the restrictions because they have not themselves got the property free from the restrictions. The new purchaser will be subject to the obligations imposed by the original deed, and the first owner, or the adjoining owner, will be able to sue her on the covenant, the liability being attached to the land itself, not to the purchaser personally. If, for instance, the restriction is against using the house as a beershop, and the purchaser uses it as one, the adjoining owner may at once restrain the owner of the house from a breach of the covenant inasmuch as the liability attaches on the occupant with notice to the land itself. It is out of the range of possibility, however, to prove that this liability on any covenant now subsisting under the deed of 1846 will after the sale attach to the persons of the vendors. The vendors are therefore under a mistake. They have protected themselves against unreasonable requisitions; and that is all.

The meaning of the 7th condition is that they shall be in a position to protect themselves against any unreasonable requisition, and against unnecessary trouble and expense. The condition gives no right to the purchaser to make requisitions after the fourteen days from the delivery of the abstract, and she has not acquired since any right to make requisitions.

But she has made no objection or requisition at all: she merely says, "Let me see a copy of the deed by which these restrictions are imposed on the land," and that is all: she makes no objection. It is a mistake to say that the purchaser has made any objection or requisition, she has made none and insisted on none. There is no pretence for saying that the vendors will be prejudiced or incur any liability if the purchaser takes the property without the conveyance stating that she takes it subject to the restrictions.

What is the meaning of this 7th condition? The vendors have protected themselves by this condition, so they say, against a certain danger—a danger which has never existed, does not now exist, and never can exist. In my opinion the vendors' objection is wholly unreasonable. The authorities that have been cited are all opposed to their contention. If a purchaser makes an unreasonable requisition and insists upon it, he may come within a condition such as this and lose his contract; but here the purchaser adopts the very title the vendors have made, and is prepared to take a conveyance in the form indicated by the abstract. This objection of the vendors is—I will not say hardly honest but—hardly a fair objection: no requisitions were made and insisted on, no unreasonable objections were made, the contract was clear; and therefore I hold that the purchaser is entitled to specific performance in the terms of the summons, and the vendors must pay the costs of the application. There had better be a reference to Chambers in case the parties differ as to the form of the conveyance.

Marten asked for a declaration that the purchaser could not on completion be required to pay the vendors any interest on the balance of the purchase-money higher than that allowed by the bank at which the balance had been deposited: *Kershaw* v. *Kershaw* (1).

Millar:—Does your Lordship think you have jurisdiction to make such a declaration?

BACON, V.C.:—I shall make it. The purchaser honestly intends to perform her part of the contract, and has shewn her honesty by having her money ready, but the vendors refuse to take it.

Solicitors for Purchaser: *Clarke, Woodcock, & Ryland*, for *Isaac Cooke, Sons, & Dunn, Bristol.*

Solicitors for Vendors: *Tompson, Pickering, Styan, & Neilson.*

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(1) Law Rep. 9 Eq. 56.

G. I. F. C.

In re COOPER.
COOPER *v.* SLIGHT.

KAY, J.
1884
June 20.

[1884 C. 976.]

Will—Life Interest—Infant Residuary Legatee—Power of Advancement exerciseable with Consent of Life Tenant—Bankruptcy of Life Tenant—Effect of.

A testatrix who died in 1884 gave a moiety of a trust fund to trustees upon trust to pay the income to *J. C.* during his life, and after his death in trust for *W. J.* (an infant), empowering the trustees to raise any part not exceeding one half of *W. J.*'s share for his advancement, subject to the consent in writing of *J. C.* during his life.

The trustees were desirous of exercising the power, but *J. C.* had become a bankrupt, and was still undischarged:—

Held, that *J. C.*'s power of consenting to the advancement was not extinguished by his bankruptcy, but could not be exercised without the sanction of his trustee in bankruptcy acting under the direction of the Court of Bankruptcy.

ADJOURNED SUMMONS.

Eliza Cooper, who died in January, 1884, by her will, dated in 1883, gave all her property to trustees upon trust for conversion and investment; and directed her trustees to stand possessed of the trust funds upon trust as to one moiety thereof to pay the income to *James Cooper* during his life, and after his death in trust for *William James*, and declared that the trustees might "raise any part or parts not exceeding one half of the share of the said *William James*, under the trusts hereinbefore declared, and apply the same for his advancement or benefit, subject to the consent in writing of the said *James Cooper* during his life."

James Cooper became bankrupt in February, 1882, and was still undischarged. The trustees were desirous of exercising their power of raising a part of the share of *William James* (who was an infant) for his advancement or benefit. *James Cooper* was willing to consent; and the only question was whether he could, notwithstanding his bankruptcy, give such consent.

Chadwyck Healey, for *Thomas Craddock*, the trustee in bankruptcy:—

The tenant for life cannot consent to the advancement except with the concurrence of his trustee in bankruptcy. I do not say that his power to consent has gone by reason of the bankruptcy, but that it is not exercisable except with the trustee's approval.

[KAY, J., referred to *Badham* v. *Mee* (1) and *Hole* v. *Escott* (2).]

And in addition to those cases there are the decisions in *Holdsworth* v. *Goose* (3) and *Eisdell* v. *Hammersley* (4), which have been approved by the Court of Appeal: *Alexander* v. *Mills* (5).

[KAY, J.:—Is there any case in which the doctrine has been applied to a consent to the exercise of a power of advancement?]

I am not aware of any such case.

[He also referred to the *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), s. 44.]

Sir *Arthur Watson*, for the next friend and guardian of the infant *William James*:—

There are exceptions to the rule that a bankrupt cannot exercise or consent to the exercise of a power in a case where such exercise would have the effect of taking away a portion of his estate; and of this *In re Jakeman's Trusts* (6) is an instance. And this case ought also to be made an exception to the rule for the benefit of the infant, who is in great want, and has nothing to do with the bankruptcy.

Sub-sect. ii. of the 44th section of the *Bankruptcy Act*, 1883, only comprises the capacity to exercise such powers as the bankrupt might have exercised "for his own benefit," and does not touch a power of this kind, which is exercisable with his consent for the benefit of somebody else.

Hugh Humphry, for the trustees of the will.

No reply was called for.

KAY, J.:—

I think that the law on this subject is pretty clear. In *Badham* v. *Mee* the learned Judges who had to decide that case gave a certificate without expressing any opinion on the case. Their certificate was as follows: "We have heard this case argued by counsel, and have considered the same; and we are of opinion that from and after the execution of the deed of appointment of the 2nd of January, 1819, *Richard Mee*, the son, did not take any estate in the lands and hereditaments mentioned in the case under the said deed of appointment; but under the deeds of the 24th and 25th of April, 1794, took an estate tail in remainder expectant on the determination of the life estate of his father."

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(1) 7 Bing. 695.
(2) 4 My. & Cr. 187.
(3) 29 Beav. 111.
(4) 31 Beav. 255.
(5) Law Rep. 6 Ch. 124.
(6) 23 Ch. D. 344.

The decision itself is stated in the marginal note to the report of the case, whence it appears that by a marriage settlement the husband took an estate for life with power of appointment to children; remainder to trustees to preserve, &c.; remainder to children in tail in default of appointment; remainder to husband in fee in default of issue. The husband became bankrupt, conveyed in the usual way all his property by bargain and sale to his assignees, and afterwards executed an appointment to his son in fee, after his own life estate. The assignees sold the life estate to the bankrupt's mother. It was held that the son took nothing under the appointment, but was entitled to an estate tail under the original settlement.

The grounds for the judgment of the Court of Common Pleas are not given in the report.

In *Hole* v. *Escott* (1) the facts were as follows: A husband, upon marriage, settled an estate to the use of himself for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of trustees for a term of years, to secure a jointure for the wife, with remainder to the use of such children of the marriage as the husband and wife jointly, or in default of a joint appointment, the survivor of them, should appoint, with remainder, in default of such appointment, to the children of the marriage living at the death of the survivor equally, and if none such to the right heirs of the husband. The husband became bankrupt, and after his bankruptcy he and his wife made a joint appointment in favour of two of the children of the marriage. The husband then died, and a bill

(1) 4 My. & Cr. 187.

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having been subsequently filed by a person claiming under the bankruptcy for an account of the rents of the settled estate, the wife thereupon executed a separate appointment in favour of the same children, which she stated in her answer. The Lord Chancellor (Lord *Cottenham*) said (1): "The objections made to the two appointments upon which the title of the children rested are totally distinct. To the joint appointment by the father and mother, after the father's bankruptcy, two objections were made: first, that the power was extinguished by the bankruptcy; secondly, that if not extinguished, no title could be obtained under the execution of it, inasmuch as the bankrupt could not be permitted to destroy the title of his assignees. Upon the first point I do not propose to express any opinion. It is not necessary that I should do so, for the purpose of the judgment which I propose to pronounce; and, considering the doubt that exists as to the grounds of the opinion of the Court of Common Pleas in the case of *Badham* v. *Mee* (2), I think it inexpedient and unnecessary to discuss the question."

In a later case of *Holdsworth* v. *Goose* (3) a power of sale over settled estate was given to trustees, at the request and by the direction of the tenant for life. The tenant for life became bankrupt, and it was held that the power was not extinguished, but that with the assent of the tenant for life and his assignees, a perfect title could be made under the power; thus determining the very point which was left uncertain in *Badham* v. *Mee* and *Hole* v. *Escott* (4).

Then in the case of *Eisdell* v. *Hammersley* (5) a power given to trustees to sell realty with the consent of the tenant for life was held exercisable after his bankruptcy with the consent of the tenant for life, and of all persons who had become interested in his estate.

In the later case of *Alexander* v. *Mills* (6), where the trustees of a settled estate had a power of sale to be exercised at the request and direction of a tenant for life, who was also entitled to the ultimate reversion in fee, and who had made an absolute conveyance of all his interest for value, it was held by the Court of Appeal, reversing the decision of *Romilly*, M.R., that the power of the tenant for life to consent was not extinguished by the absolute alienation of his life estate, and could still be exercised with the concurrence of the alienee.

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(1) 4 My. & Cr. 189.
(2) 7 Bing. 695.
(3) 29 Beav. 111.
(4) 4 My. & Cr. 187.
(5) 31 Beav. 255.
(6) Law Rep. 6 Ch. 124.

In that case the learned Judge who delivered the judgment of the Court of Appeal referred with approval to *Holdsworth* v. *Goose* (1) and *Eisdell* v. *Hammersley* (2), the Court thus preferring the earlier decisions of *Romilly*, M.R., to that which they then had under review.

I must take it now as well settled that where the tenancy for life and ultimate reversion are vested in one and the same person, there being intervening interests or limitations, and there is a power of appointment given to that person which might defeat his own interest, then if he becomes bankrupt, or assigns his property for the benefit of his creditors, that power is not extinguished, but he is not allowed to exercise it so as to defeat the interest of his trustee in bankruptcy or of his assignee. So that the power not being extinguished, if the trustee in bankruptcy or the assignee chooses to say, " I do not object to the exercise of your power," it may be exercised. If he does object, then he has the right to say, " You shall not exercise it."

Of course the trustee in bankruptcy could not give his consent without the sanction of the Court of Bankruptcy. It appears that the property of *James Cooper* is now vested in his trustee in bankruptcy for the benefit of creditors. If the power of advancement to children is exercised it would destroy part of the estate so vested in the trustee in bankruptcy.

I am clear that, although the exercise of the power would be for the benefit of the child, who has nothing whatever to do with the bankruptcy proceedings, yet without the consent of the trustee in bankruptcy, acting with the sanction of the Court of Bankruptcy, the trustees of the will cannot be allowed to exercise that power.

No case can be found to warrant any other assumption.

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(1) 29 Beav. 111.

(2) 31 Beav. 255.

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His Lordship then made a declaration that the power of *James Cooper* to consent to an appointment by way of advance by the trustee to the infant *William James* had not been extinguished by his bankruptcy, but that such power of consenting could not be exercised without the sanction of the trustee in bankruptcy.

Solicitors: *Sidney Steadman & Co.; Hicks & Arnold; Mott & Dent.*

W. W. K.

KAY, J.
1884
July 1.

In re HEATON'S TRADE-MARK.

Trade-mark—Registration—Length of adverse User—Fraudulent Commencement—Continuing Misrepresentation—Foreign Proprietor.

Mere length of adverse user will not of itself make a mark which was originally a trade-mark *publici juris*, where such user was originally fraudulent and is still calculated to deceive, but it throws upon the trader claiming an exclusive right to the mark the onus of proving such original fraud and continuing misrepresentation, and the longer the user the stronger must be the evidence.

Upon this principle an application to register under the *Trade-marks Acts* in combination with the name of the applicants, a foreign trade-mark which had been used by the applicants and by thirty other firms in this country in combination with their own respective names or with some device for fifty years, was refused upon the opposition of the foreign proprietor of the mark who had only recently discovered such user.

The owners of the ironworks at *Leufsta*, in *Sweden*, had in 1718, registered in *Sweden*, as a trade-mark, the letter L within a circle (called in the trade the Hoop L), and their iron so marked had acquired a high reputation, particularly for manufacture into blister steel. By Swedish law all bar iron must be stamped with a duly registered mark before it is exported, and, from the year 1835 the *Leufsta* iron was exported to *England* marked with the Hoop L in combination either with the name of the English consignee, or with the word "*Leufsta*" or with both. In 1878 the Hoop L was registered in *England* by the *Leufsta* owners as a trade-mark both alone and in combination with the word "*Leufsta.*"

In 1882 the *B. Company*, a firm of English steel manufacturers, applied to register under the *Trade-marks Acts* the Hoop L in combination with the words "*B. Company, Warranted,*" and produced evidence to shew that for fifty years they and thirty other firms had used the Hoop L in combination with a name or with a device upon all blister steel manufactured from Swedish iron, whether *Leufsta* iron or not, cutting off from inferior iron its distinctive stamp and substituting the Hoop L.

KAY, J.

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The *Leufsta* owners opposed the application, and proved that this adverse user was not discovered by them until 1881:—

Held, that the Hoop L mark had not become *publici juris*, and that the application to register it must be dismissed with costs.

ADJOURNED SUMMONS.

This summons arose out of an application made on the 22nd of February, 1882, by *George Caleb Adkins* and *George Heaton*, who trade under the firm of *The Brades Company*, and also as *William Hunt & Sons*, and are manufacturers of iron, steel, and edge tools, to register under the *Trade-marks Registration Acts*, 1875 and 1877, for "steel and iron wrought and unwrought," in class 5, a trade-mark consisting of the letter L within a circle Ⓛ (known as "the Hoop L") in combination with the words "*Brades Co., Warranted.*"

The application was opposed by the Baron *Louis de Geer*, unless the registration was limited by inserting in the description of goods after the words "steel and iron wrought and unwrought," the words "not being Swedish bar iron or steel made therefrom," and appending a note that the Hoop L was not claimed *per se*, but only as part of the combination. The Baron *de Geer*, who was the proprietor of certain ironworks at *Leufsta*, in the district of *Dannemora*, and kingdom of *Sweden*, claimed the hoop L mark as the exclusive property of his firm, and had on the 20th of May, 1878, registered in *England*, for Swedish *Dannemora* bar iron in class 5, two trade-marks, one the Hoop L alone and the other the Hoop L in combination with the word "*Leufsta.*"

By their counter-statement the applicants contended that the Baron *de Geer* had no right to register the Hoop L, as it was a common mark, and stated that "if Swedish *Dannemora* bar iron means only iron worked at the ironworks at *Leufsta*, . . . we are willing, as a matter of concession but not as a matter of right, and without prejudice to the question whether the letter L is or is not a common mark, to undertake not to use our said trade-mark upon such iron."

This summons was then taken out, and it appeared from the evidence adduced on the hearing, which is more fully referred to in the judgment of his Lordship, that the Hoop L. mark was originally the exclusive property of the firm now represented by the opponent; that the iron manufactured in *Sweden* by this firm had for a long period of time, ever since, it was said, the year 1643, been stamped under the Swedish laws in that behalf, with the Hoop L, which was registered in *Sweden* as a trade-mark in the year 1718; and that from the year 1835 it had been the practice of the firm to export their iron to a single English purchaser who was changed from time to time, and to stamp their iron before it left *Sweden* with the name of the English purchasing firm for the time being as a bye-stamp in addition to the original Hoop L, which bye-stamp they also registered in *Sweden.* This practice was continued down to 1864, when the opponent's brother, Baron *de Geer,* who was the then proprietor, with the intention of discontinuing exporting his iron to one English firm only, adopted and registered in *Sweden* as a bye-stamp, in addition to the Hoop L the name "*Leufsta,*" and in 1866 his exported iron was thus marked. In 1867 the former practice was reverted to, Messrs. *W. Jessop & Sons* became the sole English purchasers, and the iron was then marked "Ⓛ *Leufsta, W. Jessop & Sons.*" This continued down to 1880, when the opponent, who had succeeded his brother as proprietor, entered into a contract under which *Firth & Sons, Limited,* became the sole importers into *England* of the opponent's iron, which iron thenceforth was marked, without the name of any consignee, "Ⓛ *Leufsta*" only.

It was admitted that the best iron in the world, and that most suited for the manufacture of "Blister Steel," came from *Dannemora,* and that the iron manufactured by the Baron *de Geer* at *Leufsta* had a higher reputation than any other *Dannemora* iron.

By Swedish law every bar of iron must be stamped with a duly registered mark before exportation. Such marks are not obliterated by the process of converting iron into blister steel, and the evidence on behalf of the applicants shewed that it had long been a practice with themselves and their predecessors, not only to preserve the Hoop L mark and use it in combination with their own trade name upon blister steel manufactured from the opponent's iron, but also when manufacturing blister steel from other and lower qualities of Swedish iron, to remove the original Swedish marks therefrom and to put on the bar iron the Hoop L in combination with their own name; and there was evidence that the practice had been pursued for fifty years, not only by the applicants, but by thirty other firms of iron and steel manufacturers in this country, who always put on their blister steel the opponent's mark, either in combination with their own name or with a device, whether they had purchased the Swedish bar iron from him or not. There was also evidence that the Hoop L had been registered in *England* in combination with words or devices by Mr. *Henry Hall* of *Brierly Hill*, on the 31st of August, 1876, and subsequently by Messrs. *Bradley & Sons.*

The opponent, by his evidence in reply, deposed that neither he nor his predecessors were aware of any such user of their brand until informed by *Frith & Sons, Limited*, in 1881, of the registrations of *Henry Hall* and *John Bradley & Sons*, nor that any other persons or firms were claiming to use his trade-mark until he received the applicants' affidavits; and also produced evidence to shew that the proposed use of the Hoop L as part of a trade-mark was calculated to deceive.

Hastings, Q.C., and *John Cutler*, for the applicants:—

The Hoop L is a common mark in *England* for steel. We and our predecessors, and thirty other firms, have used it in combination with our respective names for fifty years; and although we cannot of course claim any exclusive right to a common mark, we have a perfect right to register as a trade-mark that common mark combined with our trade name. Moreover, the opponent has ever since 1835 ceased to use the Hoop L except in combination.

They cited or referred to *In re Hyde & Co.'s Trade-mark* (1); *In re J. B. Palmer's Application* (2); *In re J. B. Palmer's Trade-mark* (3); *In re Horsburgh & Co.'s Application* (4); *In re Kuhn & Co.'s Trade-marks* (5); *In re Riviere's Trade-mark* (6); *Lea* v. *Millar* (7); *In re Powell* (8).

(1) 7 Ch. D. 724.
(2) 21 Ch. D. 47.
(3) 24 Ch. D. 504.
(4) 53 L. J. (Ch.) 237.
(5) 53 L. J. (Ch.) 238.
(6) 26 Ch. D. 48.
(7) Sebas. Dig. 305.
(8) Ibid. 357.

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Rigby, Q.C., and *Sebastian*, for the opponent:—

This alleged user has been behind our backs and without our knowledge until we discovered it in 1881; and it is a user which commenced in fraud and has been continued for purposes of misrepresentation. For the use of the Hoop L is a representation that the steel on which it appears is made from Swedish *Dannemora* iron manufactured in our ironworks at *Leufsta*, and cannot mean anything else. Such a user, having its inception in fraud, and being calculated to deceive, cannot, however long continued, take away our right of proprietorship or receive the sanction of the Court: *Rodgers* v. *Rodgers* (1); *Ford* v. *Foster* (2); *Sykes* v. *Sykes* (3); *Orr Ewing & Co.* v. *Johnston & Co.* (4); *In re Jelly, Son, & Jones' Application* (5). Any fraud may be redressed in the country in which it is committed, whatever may be the country of the person who has been defrauded: *Collins Co.* v. *Brown* (6); *Taylor* v. *Carpenter* (7).

Hastings, in reply, referred to *Gilbert* v. *Endean* (8).

KAY, J.:—

This case comes before the Court upon an application to register a trade-mark. It is opposed by the Baron *de Geer*, and is referred to the Court.

The question is whether, on all the facts of the case, the applicants are entitled to have the trade-mark which they claim put on the register.

Their case is this—I read it from the affidavits: "It is, and has been for over fifty years last past, the practice of us and our predecessors to openly and publicly manufacture for sale, and sell both at our works at the *Brades*, and our warehouse in *Birmingham*, blister steel with the brand or trade-mark," of a circle with the letter L printed in the middle of it (which has been called Hoop L), thus Ⓛ, and the words following, "*Brades Co.*,

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(1) 31 L. T. (N.S). 285.
(2) Law Rep. 7 Ch. 611.
(3) 3 B. & C. 541.
(4) 13 Ch. D. 434; 7 App. Cas. 219.
(5) 51 L. J. (Ch.) 639.
(6) 3 K. & J. 423.
(7) Sebas. Dig. 39.
(8) 9 Ch. D. 259.

Warranted," "which we are now seeking to register, and which is hereafter referred to as our trade-mark), affixed thereto or impressed thereon." Then they prove a price list of their firm more than forty years old containing entries of "Ⓛ Blister Steel, *Brades Co.*, Warranted," "Ⓛ Blister Steel, *Brades Co.*," and one other entry of "Ⓛ Blister Steel, *Sykes*." That evidence is supported by evidence that thirty other firms—I take the number from the statement of counsel—in *England* have used this Hoop L mark in connection with their names upon Swedish iron. This is the evidence—which again I take as to number from counsel—of sixteen witnesses, most of whom are people engaged in the steel and iron trade in this country; and it is admitted that the use, both by the applicants and by those other thirty firms, has been chiefly upon Swedish iron and not upon English iron. There has been some trifling evidence of the use of it to a very small extent upon Norwegian iron, and there is some suggestion of its having been used once upon Russian iron; but the use of it chiefly is upon Swedish iron. Now that makes a case of which it is impossible not to see the strength and force.

I have been referred by the opponent to an authority of *Rodgers* v. *Rodgers* (1), and to the language of Lord Justice *Mellish* in that case. I should observe, before I read the words, that the case was not one of an application to put upon the register a trade-mark, but of an application to restrain a person from using a certain trade-mark. The cases have, of course, considerable analogy. Lord Justice *Mellish* says: "Now, I do not think that, as a matter of law, the mere fact that it has been used for a great number of years necessarily affords a defence. If it was clearly made out that it was originally used for the purpose of fraud, that it was continued for the purpose of fraud, and that it has the practical effect of deceiving the public, I do not think that the lapse of years would prevent the plaintiffs having a remedy"—that is, against the defendants—that being a case of an application for an injunction against the defendants. Then, later on, he says: "But, at the same time, when the defendants have done what they are now charged with doing for such a very great number of years, the Court must require very clear proof both that the acts complained of have been done fraudulently and that they have had the effect of doing practical injury." Again, he says: "When it has gone on for such a number of years, and when it has to be proved that it was originally begun fraudulently and was continued fraudulently during all these years, and that it is calculated to deceive, it appears to me that very much stronger evidence is required."

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(1) 31 L. T. (N.S.) 285, 287.

Now, I do not express the least dissent from that proposition. Where persons come and object, in whatever form, to the use of a trade-mark which has been used for a great number of years, it does not follow, as a matter of course that the use for a great number of years is an absolute bar to obtaining an injunction; but, most certainly, it throws on those who object to the use the onus of proving that it was originally a fraudulent use, and that it is calculated to deceive; and very much stronger evidence is required in such a case where there has been a long user than would be required in another case.

Well, then, also I think the language of the same learned Judge, in *Ford* v. *Foster* (1), may be accepted as a very good definition of what the test should be, whether a mark has, by long user, become a thing *publici juris* or not. His words are these:—"Then what is the test by which a decision is to be arrived at, whether a word which was originally a trade-mark has become *publici juris?* I think the test must be, whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark, as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade-mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade-mark, the right to the

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(1) Law Rep. 7 Ch. 628.

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trade-mark must be gone." Now herein lies the strength of the applicants' case. It seems to me to be a case which it is extremely difficult to oppose. It is very difficult to get over the effect of this very long user by the applicants themselves for fifty years. That difficulty is increased by reason of its being shewn to be, not a user by themselves alone, but a user by many other firms (and I have no doubt many of them of the highest respectability) and for long periods, and a user very similar to their own.

On the other hand, the Baron's case is this. He has proved that for a very long time indeed this Hoop L mark has been the principal trade-mark of his firm. He says that according to his information and belief it goes back to some date anterior to the year 1643. That, of course, can only be belief, but it is that sort of belief which the tradition of a firm makes, perhaps, of some little value. Then he proves distinctly, that in the year 1718 this device of the Hoop L—that and nothing else—was registered in *Sweden* according to the law of that country as a distinctive mark of iron produced at the works belonging to his ancestors in *Sweden*. Then, it seems, in the year 1835 the firm which he now represents sold their iron to an English purchaser or firm of purchasers, Messrs. *Sykes*, of *Hull*, and by agreement with them they registered in *Sweden*, as an addition, or bye-stamp, as it is called, to the Hoop L mark, the name of Messrs. *Sykes*. Thenceforward, for some time, the stamp impressed upon the iron manufactured by the Baron *de Geer* was the Hoop L with the addition of the word "*Sykes*." That went on to about 1855. From 1855 to about 1864 Messrs. *Wilkinson*, of *Hull*, were the sole English purchasers from the Baron, and they, by a similar agreement registered their name—I am speaking always of registration in *Sweden*—and during that period the Hoop L iron was stamped "Ⓛ *Wilkinson*." In 1864 and 1865 Messrs. *Hinde & Gladstone*, of *London*, were the sole English purchasers, and by a similar agreement they registered their name, and during those years the iron was stamped "Ⓛ *Hinde & Gladstone*." Towards the end of the year 1864 a change was made, and the then proprietor, who was the late brother of the Baron *de Geer*, "with the intention to discontinue exporting his

Hoop L iron to one English firm only, and being desirous that confusion should not be produced by the registration and use of different names at the same time as bye-stamps by the different English firms who should buy his Hoop L iron, adopted and registered in *Sweden*, as a bye-stamp or additional mark for his *Leufsta* iron and iron products, the name '*Leufsta*,'" which I understand is the name of the works where the Baron *de Geer's* business has been carried on, and is now carried on, "and the said additional stamp or mark '*Leufsta*' became and is the exclusive property of the proprietor of the said works." "On the termination of his contract with Messrs. *Hinde & Gladstone*, at the end of the following year, my said brother begun to export his said Hoop L iron to more English firms than one, and during the year 1866 he exported his said Hoop L iron to several English firms, the said iron being throughout the said year 1866 stamped 'Ⓛ *Leufsta*' only, and not with the name of the said English firms." That brings us down to the year 1867, and in the year 1867 the Baron's brother issued this circular in *England*, addressed obviously to English purchasers and consumers:—"*Brightside Steel Works, Sheffield*, Notice to the consumers of the genuine Swedish *Dannemora* iron Ⓛ, I beg to announce that I have this day entered into a contract with Messrs. *W. Jessop & Sons*, of *Sheffield*, for the whole annual make of the above iron, which in future will be stamped Ⓛ *Leufsta—W. Jessop & Sons*—and to which I request the special attention of the trade. *Carl Emanuel De Geer*, proprietor." It is dated from *Leufsta*, in *Sweden*, 29th April, 1867. Then there follows something from *Jessop & Sons* themselves in these words:—"*W. Jessop & Sons* (*Limited*) in referring to the above announcement beg to inform consumers that the genuine Ⓛ *Leufsta W. Jessop & Son's* iron can only be obtained from them, and that they are prepared to supply the trade on liberal terms. At the same time *W. J. & S.* wish to caution dealers in foreign iron against spurious imitations of the whole or any part of the genuine brands, as *W. J. & S.* are resolved in case of infringement to protect their own and the proprietor's rights in the same." The result of that is, that having the original Hoop L as the sole distinctive mark and design, the Baron's firm have from time to time added the names of the person to whom their output of iron was sold in this country; and from the year 1864, instead of adding the name of the English purchaser, which changed from time to time, and might, of course, be more than one, so that it would be inconvenient to have the addition of several different names, they have added the name of "*Leufsta*," which is the name of the locality of thier works, and also, in the case of *W. Jessop & Sons*, the name of "*W. Jessop & Sons*," they being the purchasers of the whole output of the iron.

Now, I understand the case on the Baron's part to be this, and it is admitted by the evidence, in the witness-box, of one of the applicants, Mr. *Heaton*, who gave his evidence very candidly and fairly:—There is in *Sweden* a region called *Dannemora*, from which iron ore is produced of the purest quality of any produced in *Sweden*, or, it would seem from the evidence before me, in the world. This iron is manufactured in *Sweden*, not merely by the Baron *de Geer*, but by other manufacturers; and, being made into bars, by the aid of charcoal instead of coal, it is the very purest and best iron for the purpose of conversion into the highest quality of steel that is known in the world. Each manufacturer has registered, and has always had registered, his own particular brand; and of all these brands the manufacture of the Baron *de Geer*—whether because of his better processes, or because he happens to obtain the best ore of all, I do not know—has acquired the highest reputation, and the Hoop L bar iron manufactured by the Baron *de Geer* is looked upon as the finest iron in the world for the purpose of being manufactured into steel for the highest qualities of work: that is clearly admitted by all parties.

Now the applicants have very fairly told us what their case is. They say that they and the other manufacturers whose evidence has been given, have, for this long series of years, been accustomed to buy Swedish iron; of which there are many brands—it is said a thousand—and, of course, many of inferior quality to the *Dannemora* iron; the evidence shewing that the next in quality is something like £7 a ton less in value than the *Dannemora* iron, and so it goes down to as great a difference as £12 a

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ton—I am speaking of the higher qualities of Swedish iron. What we do, they say, is this: we take the Swedish iron we buy, which has stamped upon the bars a particular brand; we manufacture that into blistered steel, the process of doing which is to put it into crucibles with charcoal or some other material, in layers, between the bars, and then we expose that to a great heat, which has the effect of converting the iron into the finest possible steel. In that conversion the heat is never raised to the melting point, but it produces this effect upon the iron, that the surface of the iron rises in blisters all over the bars, and accordingly it is called, when manufactured, blistered steel, but this process does not at all interfere with, so as to efface or make illegible, the marks stamped upon the bar iron, as, of course, the *Bessemer* process, and perhaps other processes of converting iron into steel would do. And accordingly the applicants say, whenever we manufacture the Baron *de Geer's* iron into steel we leave his mark upon the iron, and it appears upon the steel when manufactured; inasmuch as it would not answer our purpose to remove that mark and put any other mark upon it, because if we did we should deteriorate the price of the steel when manufactured, for no manufactured steel produces so high a price in the market as that which is made from the Baron *de Geer's* Hoop L iron. But, they say, what we do with other and lower qualities of Swedish iron is this; we cut off the mark before we begin to convert it into blistered steel, and we put upon the bar iron instead of the original mark, which shewed it to be an inferior iron to the Baron's, this mark of ours "Ⓛ *Brades Co.*, Warranted." Sometimes, as the evidence has shewn, the name is put the other way—"*Brades Co.*, Warranted Ⓛ." The other manufacturers, though it does not appear very clearly in their evidence, I am told at the bar, do the same thing. They never think of removing the Baron's mark from his iron before they turn it into blistered steel, but they remove from the other and lower qualities of Swedish iron the distinctive marks of those lower qualities, and they put upon those lower qualities this Hoop L mark, coupled with their own name, or with, in one instance, a crown or something of the kind. That has been the practice of these manufacturers, and of this particular firm, who are now applying for registration, as they say, for more than fifty years.

Now the applicants offer quite frankly to put themselves under a condition. They are willing, in the first place, to disclaim any right to the Hoop L mark by itself; they are willing to disclaim that as the essential part of their trade-mark, and they only claim the combination of their own name and the word "warranted" with the Hoop L mark, and more, they are willing to undertake not to use this mark upon English iron. Indeed, Mr. *Heaton* said very frankly in the witness-box, that he had tried it and found it did not pay, because they could not make, out of the English iron, steel which would deceive anybody, although they put the Hoop L mark upon it. They are willing also, as I understand Mr. *Hastings* in his reply, to undertake not to use their own mark upon the Baron's iron, or upon any iron which comes from the mines of *Dannemora*, and which is almost of the same value as the Baron's iron. I so understand it. Accordingly, what they ask the Court to do is this:—Sanction by registration that practice which we have been following for the last fifty years, namely, the cutting off the name and brand from the inferior qualities of Swedish iron—not from the superior qualities, those we will not touch, and the putting on of the Hoop L mark with our name and the word "Warranted."

Of course nobody would deny that if that were being done now for the first time it would be the grossest fraud that could possibly be imagined. I should have no hesitation whatever, if the case came before me as a judge, and I was asked to grant an injunction, and it were proved that that was being done for the first time, in characterising and stigmatising it in the strongest language, and granting at once an injunction to prevent its ever happening again.

But that is not the case at all. The thing has been done for fifty years by these very applicants, and the question is now whether, having done this for fifty years, anybody can be deceived by it, or whether it can possibly now have the character of a fraud. Of course, I do not suppose, and I do not mean by any language I use to suggest, that the intention of the applicants is to commit fraud, or to ask the Court to sanction a fraud.

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But is the question the same as if I had now before me an application to grant an injunction? If I had before me an application to restrain this use by these present applicants of the Hoop L mark, I must require, according to the language I have read of Lord Justice *Mellish* in the case of *Rodgers* v. *Rodgers* (1), very clear evidence that persons are now deceived by that use; but the applicants say (and I hope they will not take exception to the language in which I put their argument) this has been done so often that it has lost its power to defraud, it has become so common a fraud among all manufacturers that it is impossible anyone should be deceived by it now, and therefore they say, not that the Court cannot grant an injunction, but that the Court must put its own seal upon this transaction and add to it the approval of the Court by allowing the mark to be registered!

I absolutely decline to do this.

It seems to me there never was a clearer case brought before a Court of Justice.

This was evidently in its origin a gross fraud. I am not satisfied now, nor would any amount of evidence satisfy me, that this transaction, which I assume to be done in all innocence, is not calculated to deceive. To ask a Court of Justice to sanction by its fiat and by allowing to be put upon the register a mark adopted in absolute fraud of the rights of another man; to ask to allow to be done, under the sanction of a registration permitted by the Court, this act which is properly characterised as a continuing misrepresentation, an attempt to make out that this iron of an inferior quality is the iron which is well known now in the market as the best iron produced, seems to me an utter absurdity, and absolutely out of the question. The question is not the same as whether the Court can grant an injunction or not, as to which I say nothing because that matter is not before me; but I most distinctly say, in my opinion it is the duty of the Court to mark in the strongest possible manner its disapprobation of this kind of proceeding, however long it may have been sanctioned by custom. I say that I am not satisfied that this would not, if continued, be eminently calculated to deceive. I think it would be. It seems to me there may be many purchasers of this blistered steel and of iron, who, knowing the reputation which the Hoop L mark has obtained, and has had for so long a time, even for centuries, might well be deceived by seeing upon blistered steel, made admittedly from Swedish iron, this Hoop L mark coupled with a name. The name which the Baron has from time to time added to the mark itself upon his own iron has from time to time been changed. What is to prevent a purchaser of the blistered steel supposing that the changed name was the name of the consignee of the Baron's iron? Nothing at all that I can make out; and besides that, I have staring me in the face, on this trade-mark of which it is sought to obtain the registration, the word "Warranted."

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(1) 31 L. T. (N.S.) 285.

Now, what does the word "Warranted" mean? Warranted what? Warranted, that it is manufactured into steel by the *Brades Company?* Clearly nothing of the kind. It means, if the word has any meaning at all, "we warrant this to be made from the Hoop L iron," a falsehood which certainly gains nothing in respectability from being continually repeated. That again is a reason why, if any other trade-mark with the Hoop L as part of it could be registered, this is not the one that should be. I have no hesitation therefore in saying that this is an application which ought not to be granted, and I dismiss it with costs.

Solicitors for Applicants: *Beale, Marigold, Beale, & Groves.*

Solicitor for Opponent: *H. A. Maude*, agent for *Broomhead, Wightman, & Moore, Sheffield.*

W. W. K.

KAY, J.
1884
July 4.

In re CHAPPLE.
NEWTON *v.* CHAPMAN.

[1881 C. 5776.]

Will—Solicitor-Executor—Direction as to Professional Charges—Construction.

A testatrix by her will appointed her solicitor (who prepared her will) one of her two executors and trustees, and, stating that it was her desire that he should continue to act as solicitor in relation to her property and affairs, and should "make the usual professional charges," expressly directed that notwithstanding his acceptance of the office of trustee and executor he should be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of the will, and the management and administration of the trust estate, real or personal, as if he, not being himself a trustee or executor, were employed by the trustee or executor. Under this direction the solicitor-executor delivered bills of costs which included charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay executor without the assistance of a solicitor:—

Held, that all items which were not of a strictly professional character ought to be disallowed.

In re Ames (1) distinguished.

ADJOURNED SUMMONS.

This was a summons taken out in an administration action in order to obtain a review of the certificate of the Taxing Master, and the question was whether a solicitor-executor was, upon the construction of the will, entitled to be allowed charges not strictly professional.

The will which appointed Mr. *Chapman*, the solicitor of the testatrix, one of her two executors and trustees, and gave him a legacy of £19 19*s.*, contained the following clause, "and it being my desire that the said *Ralph Chapman*, who is my solicitor, shall continue to act as such in the matters relating to my property and affairs, and shall make the usual professional charges, I expressly direct that he shall notwithstanding his acceptance of the office of trustee and executor of this my will, and his acting in the execution thereof, be entitled to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances,

(1) 25 Ch. D. 72.

time, and trouble given and bestowed by him in or about the execution of the trusts and powers of my said will, or the management and administration of my trust estate, real or personal, as if he, not being himself a trustee or executor hereof, were employed by the trustee or executor, and he shall be entitled to retain out of my trust moneys, or to be allowed and to receive from his co-trustee (if any) out of the same moneys the full amount of such charges, any rule of equity to the contrary notwithstanding, nevertheless without prejudice to the right or competency of the said *Ralph Chapman* to exercise the authority, control, judgment, and discretion of a trustee of my said will."

Mr. *Chapman* had delivered certain bills of costs, in taxing which the Taxing Master had (upon the authority of *Harbin* v. *Darby* (1)) disallowed all items which were not of a strictly professional character.

Farwell, for Mr. *Chapman*:—

In *Harbin* v. *Darby* the corresponding clause in the will of the testatrix only declared that the solicitor-executor should be "at liberty to charge for his professional services," and his charges were limited accordingly. Here the testatrix has gone far beyond this, and upon the true construction of her express directions Mr. *Chapman* is entitled to be allowed proper charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay executor himself, without the assistance of a solicitor. He is to be paid in short as if he had been appointed solicitor by the executor, and the executor had employed him to do all that has been done. There is authority for the allowance of charges for nonprofessional services. In *In re Ames* (2), it was held that the Taxing Master had power under the directions in the testator's will to allow a trustee, who was a solicitor, the proper charges for business, not strictly of a professional character, transacted by him in relation to the trust estate.

[KAY, J.:—There the words were that the solicitor should be allowed the usual professional "or other proper and reasonable charges."]

(1) 28 Beav. 325.

(2) 25 Ch. D. 72.

It is submitted that here the words, referring as they do to "pecuniary emoluments and remuneration," are equally comprehensive. The modern forms in ordinary use empower a solicitor-trustee to receive his usual professional costs and charges for all business transacted by him, "including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed, in person by a trustee not being a solicitor": *Wolstenholme's* Conveyancing Acts (1).

The Taxing Master was wrong in drawing a hard and fast line, and ought to have considered each item separately.

Grosvenor Woods, for the other trustee, and

J. B. Porter, for certain of the beneficiaries, were not called on.

KAY, J.:—

I have listened with some surprise to the argument which has been addressed to me. A solicitor prepares a will for a client which gives him a legacy of £19 19*s.*, and appoints him an executor and trustee, and he now comes to ask the Court to construe a direction contained in that will as authorizing him not only to make and be paid for professional charges in the usual way, but also to make and be paid professional charges for every thing which he does either as a solicitor to the executors or in his private capacity of executor. It would require very clear words to induce me to accede to such an application as that, and it seems to me that when this gentleman drew that will he was too high-minded to put into it anything which would entitle him to make such an extravagant charge. The clause in question begins by stating the desire of the testatrix that the solicitor should continue to act as such in the matters relating to her property and affairs and should "make the usual professional charges," and then she directs that he shall "be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him and all attendances, time, and trouble given and bestowed" in the execution of the trusts or powers of the will or the management or administration of the estate "as if he, not being himself a trustee or executor hereof, were employed by the trustee or executor."

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(1) 3rd Ed. Part 2, sect. 3, tit. Forms in Settlements, p. 236.

Now a trustee or executor would not employ, and ought not to employ, a solicitor to do things which he could properly do himself. And any person whose fortune it is to be a trustee or executor has many things to do which he cannot properly throw on his solicitor. Accordingly, to return to the language of the will, when it says that the solicitor shall be "entitled to retain out of any trust moneys, or to be allowed, and to receive from his co-trustee (if any) out of the same moneys the full amount of such charges," they must be charges for something in respect of which he has been properly employed. It is said, however, that there is authority on the point by which I am bound. I always struggle against being bound by authority unless the principle upon which the authority proceeds commends itself to my judgment; but in the case cited, *In re Ames* (1), the testator directed the solicitor-trustee to be allowed to make the usual professional "or other proper and reasonable charges," which words do not occur here. In my opinion the line which the Taxing Master drew was perfectly right.

Then it is said that the forms in ordinary use would authorize such charges as are here contended for, and reference has been made to a form given in the second part of Mr. *Wolstenholme's* book on the Conveyancing Acts (2). That form however contains the words "including all business of whatever kind not strictly professional, but which might have been performed or would necessarily have been performed in person by a trustee not being a solicitor." And again there are no such words in this will. I must say, however, that the form to which I have just referred is in my opinion one which no solicitor ought to put in its entirety into a will drawn by himself, unless the testator has expressly instructed him to insert those very words. This application must therefore be dismissed, and all persons who have been served must have their costs of it.

Solicitors: *Pritchard, Englefield, & Co.; G. Tilling; Stollard.*

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(1) 25 Ch. D. 72.

(2) 3rd Ed. p. 236.

W. W. K.

KAY, J.
1884
July 14.

SNOW *v.* WHITEHEAD.

[1882 S. 4940.]

Nuisance—Percolation of Water.

Defendant allowed water to collect in his cellar and to percolate into the Plaintiff's cellar.

Held, that this was a wrong within the decision of *Rylands* v. *Fletcher* (1), and that the Plaintiff was entitled to damages.

Ballard v. *Tomlinson* (2) dissented from.

THE Defendants while building a house allowed water to collect in the cellar, which percolated into the cellar of the Plaintiff's adjoining house.

Hastings, Q.C., and *G. E. S. Fryer*, for the Plaintiff, in an action which included other matters of complaint not requiring a report, asked for damages for the injury done by the water.

Robinson, Q.C., and *Boome*, for the Defendants, referred to the case of *Ballard* v. *Tomlinson*, to shew that the Defendants were not liable on the claim made for damage to the Plaintiff's premises; and submitted that there ought to be no injunction granted.

KAY, J. (after disposing of the other questions), continued:—

There is another question which I have to decide, and which involves a point of law of very considerable importance. In erecting a house upon their land, the Defendants excavated the ground to form a cellar, and they built the house and put pipes down to convey the water from the roof, but they were not connected with any drain. The rain water came through the pipes into the cellar and collected there in a pool, evidently a considerable one, because the water was used for the purpose of making mortar during the erection of the buildings. The Plaintiff had erected a house which adjoined this house of the Defendants, and in it he had a cellar which was somewhat lower than the cellar in the Defendants' house, and the water which the Defendants allowed to collect in their cellar found its way, I presume by percolation, through the land into the cellar of the Plaintiff's adjoining house, and he has been put to the expense of some £3 or £4 in getting rid of that water. The question is, whether that was a wrong on the part of the Defendants, and I was referred to the case before Mr. Justice *Pearson* of *Ballard* v. *Tomlinson* (1) as deciding that it was not a wrong in law in respect of which an action would lie. I have read that case more than once with very great interest and attention, and, with all respect to the learned Judge who decided it, I am clearly of opinion that I am bound by authorities of great weight and not only of considerable antiquity, but also decisions of higher tribunals, which seem to me inconsistent with that decision. The law is very ancient, and is expressed in the maxim, "*Sic utere tuo ut alienum non lædas.*" In the old case of *Tenant* v. *Goldwin* (2) it is stated (3) that "The plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant *debuit et solebat reparare,* and that for want of repair the filth of the privy ran into his cellar, &c. Judgment by default, and after a writ of inquiry it was moved in arrest of judgment, that this being a charge laid upon the owner himself the plaintiff should have shewed a title by prescription: *sed non allocatur*, for it is a charge laid on the defendant of common right, which by law he is subject to. As one is bound to keep his cattle from trespassing on his neighbour's ground, so he must a heap of dung if he erects it." *Holt,* C.J. (4), gave judgment for the plaintiff, saying :—"The reason he gave for his judgment in the principal case was, because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's. That the case might indeed possibly be such, that the defendant might not be bound to

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(1) Law Rep. 3 H. L. 330.

(2) 26 Ch. D. 194.

(1) 26 Ch. D. 194.

(2) 1 Salk. 21, 360.

(3) 1 Salk. 21.

(4) Ibid. 361.

repair; as if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground which lay next the old privy before, in such case the plaintiff must defend himself. But that cannot be the case here, for then he could not be bound to repair; and upon the words, *debet reparare*, he must be acquitted upon the trial. But, on the other side, if *A.* has two houses, and the house of office on the one is contiguous to the cellar of the other, but defended by a wall, and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must repair the wall of the house of office; for he whose dirt it is must keep it that it may not trespass." That case was considered, with several other decisions, which are all referred to in the judgment, in *Rylands* v. *Fletcher* (1), which was a case of a man making a reservoir on his own land near to a neighbour's mine, and the water which was introduced into the reservoir, breaking through some of the shafts, flooded the mine; and there Lord Chancellor *Cairns,* in giving judgment, stated the principles upon which he thought that case should be determined, and in doing so referred to the judgment delivered in the same case (*Fletcher* v. *Rylands* (2)) by Mr. Justice *Blackburn* (3), which in effect was that the neighbour who has brought something on his property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, "must keep it in at his peril" and should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. Those authorities, which are of the highest possible kind, have recognised, and again and again affirmed, the rule that any one who brings on his land that which in a natural state of the land would not be there, whether it be filth or water, or whatever else it be, is bound to keep it there, and answerable if it escapes in any way and injures the land of his neighbour unless it be owing to the neighbour's default. It would be easy perhaps to draw some kind of distinction between the case of *Ballard* v. *Tomlinson* (4) and those authorities; but I am unable to see any

(1) Law Rep. 3 H. L. 330.

(2) Ibid. 1 Ex. 265.

(3) Law Rep. 1 Ex. 279, 280.

(4) 26 Ch. D. 194.

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distinction in principle. The short facts of that case were that the plaintiff and the defendant were the owners of adjoining lands, each having on his land a well of a depth of 300 feet. The distance between the wells was ninety-nine yards, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and it polluted the water in the plaintiff's well. The defendant did not observe the rule, that having brought upon his land filth, he was bound to keep it there, and to see that it did not get in any way whatever on to his neighbour's land. The argument in that case seemed to be that the defendant's polluted water would not have got to the other well if his neighbour had not taken water out of his own well, and that by taking water out of his well he drew the water from the defendant's well on to his land through the defendant's land; but he had a right to pump as much water as he liked from his own well. It has been decided that if a man pumps water from his own land, and by so doing drains his neighbour's well dry, there is no wrong or harm in respect of which his neighbour can maintain an action. But if one neighbour poisons his own land so that anybody in the natural use of his well on adjoining land has that poison coming into the water in his well, can it be said that the man who so poisons his land to the injury of his neighbour is keeping in the filth which he is bound to keep in, so that it does not escape? I am not able to draw any material distinction between the case of *Ballard* v. *Tomlinson* (1) and the other authorities to which I have referred, and therefore I prefer to follow the well-known case of *Tenant* v. *Goldwin* (2), and the series of cases down to *Rylands* v. *Fletcher* (3), which affirm very distinctly the proposition that, as an application of the maxim, "*Sic utere tuo ut alienum non lædas*," anyone who collects upon his own land water, or anything else, which would not in the natural condition of the land be collected there, ought to keep it in at his peril, and that if it escape, he is liable for the consequences. This case seems to me to come within that principle. The matter is no doubt a trifling one, and if the Plaintiff had not been right upon the other point, I should not have encouraged

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(1) 26 Ch. D. 194.

(2) 1 Salk. 21, 360.

(3) Law Rep. 3 H. L. 330.

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him in maintaining an action in this Division of the High Court for so slight an amount of damage, stated to be between £3 and £4, and I assess it at £3. It seems to me that the water which collected in the cellar of the house erected by the Defendants, was not kept there by them as it ought to have been, but that it percolated and got into the cellar of the Plaintiff's house adjoining thereto, and that seems to me to be a wrong within the decision in *Rylands* v. *Fletcher* (1), and I accordingly order that the Defendants do pay to the Plaintiff £3 as damages.

Solicitors: *Charles Blake*; *G. & W. Webb.*

T. F. M.

KAY, J.
1884
July 25, 26.

In re C. FLOWER, M.P., AND METROPOLITAN BOARD OF WORKS.

[1884 F. 1048.]

In re M. FLOWER AND SAME.

[1884 F. 1049.]

Vendor and Purchaser—Sale of Real Estate by Trustees—Requisition by Purchasers that all the Trustees should attend to receive Purchase-moneys, or direct payment into a Bank.

Trustees of real estate sold parts of it to the Metropolitan Board of Works, and they sent in a requisition that the vendors should attend personally to receive the purchase-moneys, or direct the moneys to be paid to their joint account at a bank. One or more of the trustees resided in the country. On summonses taken out under the *Vendor and Purchaser Act*, 1874, by the board:—

Held, that the requisition must be complied with by the trustees, and that they must pay the costs of the application.

In re Bellamy and Metropolitan Board of Works (2) followed.

ADJOURNED SUMMONSES.

The Metropolitan Board purchased, under their statutory powers, certain freehold and leasehold lands which were vested in trustees for two sums of £4350, and the Board sent to the vendors a requisition that the trustees, three in each case, should attend personally to receive the purchase-moneys, or direct the moneys to be paid to their joint account respectively at a bank. A question having arisen as to whether the requisition could be insisted on by the Board, they took out two summonses under the *Vendor and Purchaser Act*, 1874, asking that as regarded the trustees mentioned in each, and who had contracted to sell the property for the sums mentioned to the Board, it might be declared that the requisition of the Board to them respectively that the persons to whom the purchase-moneys were payable as the trustees under a certain will, should attend personally on the completion of the purchase, and personally receive payment of the purchase-moneys, or that they should give to the Board a written direction signed by the trustees in each case for payment of the same purchase-moneys to their joint accounts at some bank to be named by them in the said direction, ought to be and must be complied with, and that the trustees should pay the costs of the applications.

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(1) Law Rep. 3 H. L. 330.

(2) 24 Ch. D. 387.

It was stated that one or more of the trustees resided in the country and at some distance from *London*, that they had no banking account and did not wish to open one.

W. Pearson, Q.C., and *Pownall*, for the Metropolitan Board of Works:—

The question raised upon these summonses is much the same as that decided in *In re Bellamy and Metropolitan Board of Works* (1), whether, upon a sale of lands by trustees, the purchaser can require them to attend personally to receive the purchase-moneys, or to jointly authorize him to pay the moneys into a bank to their joint account. The trustees are residing some in *London* and some in the country. In a case of *Webb* v. *Ledsam* (2), Vice-Chancellor Sir *W. Page Wood* said that trustees may authorize one of them to receive the purchase-moneys, but that *dictum* has not met with the approbation of conveyancers. There is no distinct authority that a purchaser must pay one of the trustees, nor that, if he does so, having the authority of the others, he would be liable to pay again, but it is submitted that the proper course to follow will be that which the purchasers have required here, whether, as was said in *In re Bellamy and Metropolitan Board*

(1) 24 Ch. D. 387.

(2) 1 K. & J. 385.

of Works (1), a purchaser " is not prudent and justifiably prudent —not over-cautious, but justifiably prudent—in saying, I will not specifically perform until I am made safe from any future question," by being allowed to pay the moneys to the trustees as the vendors, or to an account in their names at a bank.

They were stopped by the Court.

Hastings, Q.C., *J. G. Wood*, and *Manby*, for the trustees:—

The decision in *In re Bellamy and Metropolitan Board of Works* has nothing to do with the requisition in these summonses, as the question is whether, the trustees doing what they are willing to do, the purchasers would involve themselves in a breach of trust, and it is submitted that they would not, and that they are bound to pay the purchase-moneys to one trustee on the production by him of a receipt signed by, and a direction from his co-trustees to pay him. Such a payment would be equivalent to a payment to all the trustees. In *In re Bellamy and Metropolitan Board of Works* it was said that a delegation to an agent would be a breach of trust. In these cases there is a provision that any one of the trustees shall not be liable for the receipts of any other of them, except for wilful default. Though all the trustees sign the receipts clause it is what any one who receives the moneys does with them afterwards that may constitute a breach of trust, but that would not affect the purchaser. *Brice* v. *Stokes* (2) is an authority for one trustee being allowed to receive the purchase-moneys.

[KAY, J.:—That is the distinction from the case of *Styles* v. *Guy* (3).]

If all the trustees should attend it would be impossible for all to take the moneys up. It would virtually be paid to one of them, and what could it matter whether their assent should be signified by their presence or by their authority in writing? Payment into a bank would be to their agents, and if the bank should fail all protection would be gone. The purchasers are only entitled to the receipt of the trustees, and if two or three of

(1) 24 Ch. D. 402.

(2) 11 Ves. 319.

(3) 1 Mac. & G. 422.

them say verbally or in writing, Pay into the hands of one of us, that, on their receipt, is a good payment and will exonerate the purchaser: *Webb* v. *Ledsam* (1). But the course proposed is not reasonable, as one trustee resides in *South Wales* and another at *Devizes*, and they ought not to be dragged to *London* on this requisition. It would be vexatious in the highest degree. Why should the trustees open a banking account? It was unreasonable to ask it. Looking at the case of *In re Bellamy and Metropolitan Board of Works* (2), are the purchasers entitled to insist on their requisition, the circumstances being so very different? The decision in *Brice* v. *Stokes* (3) should be followed: *Lewin* on Trusts (4). All the trustees cannot receive the purchase-moneys, and as the receipt by one will discharge the purchasers, they have no right to ask for the actual and physical presence of all of them.

KAY, J.:—

I think the purchasers have a right to insist on the requisition, the object being to make themselves perfectly safe, and not to be embarrassed with anything that may arise between the vendors. In each of these cases there are three trustees with a power of sale. They have sold certain properties, and the purchases are to be completed. The vendors have said, "Hand the purchase-moneys to one of our number, who will produce to you the conveyances with the receipts on them." The purchasers said, "No, we are not satisfied with that, and would rather pay the moneys to your joint account at a bank. We do not want to be embarrassed by any questions which may arise hereafter. We want to make ourselves perfectly safe."

Now, but for the decision of the Court of Appeal in *In re Bellamy and Metropolitan Board of Works,* I should, on the authority of *Webb* v. *Ledsam,* have considered that what was proposed by the vendors would make the purchasers perfectly safe, and that they would not be reasonably justified in requiring anything else to be done. During the argument I asked whether if the requisition were that the purchasers should pay to one of the trustees without his producing any receipt, or any authority from the others to receive the moneys, that would be a good payment? It was admitted frankly that it would not. The purchasers might possibly be obliged to pay their moneys over again. Then I asked, Suppose one trustee had said, I produce a written authority from my co-trustees that I alone should receive the moneys. The answer was, That would do, and the payment would be good. Why? Because there would be an authority from the co-trustees to one trustee to receive the moneys, which, without it, he would have no right to receive. Then I asked, Suppose there were no written authority at all; but a trustee said, I produce to you the conveyance with the receipt of myself and my co-trustees for the moneys indorsed on it, and you can pay the moneys to me. It was said that that would be a good payment, and would exonerate the purchasers. Why? Because the receipt would be equivalent to a written authority, as in the other case; and would shew that the trustee had authority from his co-trustees to receive the moneys, which he could not receive without it. The question comes to this, whether a single trustee who is to receive the moneys can be made, for the purpose of the receipt, the agent of his co-trustees, so as to make the purchasers safe. Now, have the trustees a right to make one of themselves an agent to receive the moneys or not? If they have, it might be, that a trustee with special authority would say that he had a right to receive the moneys, and though I do not suppose that anything wrong would happen here, yet, looking at the matter from a legal point of view, such trustee might be enabled, by the authority so given to him, to receive the moneys, and misapply them, and they might be lost to the trust. The theory of every trust is that the trustees shall not allow the trust moneys to get into the hands of any one of them, but that all shall exercise control over them. They must take care that they are in the hands of all, or invested in their names, or placed in a proper bank in their joint names. It is quite clear that if by their acts they enable one of themselves to receive the moneys, they are liable for the receipt of them just as much as if they all received them, because they enabled the one trustee to do that which but for their special authority he would not have been enabled to do. The reason why more than one trustee is appointed, is that they shall take care that the moneys shall not get into the hands of one of them alone, that they shall take care that the trust moneys are always under the power and control of every one of them, and they have no right, as between themselves and the *cestuis que trust*, unless the circumstances are such as to make it imperatively necessary to do so, to authorize one of themselves to receive the moneys, and the case of all of them authorizing one as agent to receive the trust moneys does not, for the purpose of the decision, differ materially from that of *In re Bellamy and Metropolitan Board of Works* (1). I was of opinion in that case that the 55th section of the *Conveyancing and Law of Property Act*, 1881, which makes the production by a solicitor of a purchase deed with the receipt of the vendors on it a sufficient authority to him to receive the moneys applied to a case where the vendors are trustees. That case went to the Court of Appeal, and the Lords Justices agreed on that point, but Lord Justice *Cotton*, on page 400 of the report, said, "I think it may be safely stated as a general rule, under ordinary circumstances, that trustees are not justified in authorizing their solicitors, or other agent, to receive purchase-money which ought to be paid personally to them." I do not doubt for a moment that is the law. But does not "other agent" include one of themselves. Suppose there are three trustees, and there is a sum of £10,000 to be paid, are they justified in allowing one of themselves to receive the moneys any more than in allowing any other agent not one of themselves to receive them? Most certainly not. The duty of trustees is to prevent one of themselves having the exclusive control over the money, and certainly not, by any act of theirs, to enable one of themselves to have the exclusive control of it. That would be contrary to their duty, and although it would differ in degree it would be precisely the same kind of breach of trust which would be committed by authorizing their solicitor, or any other agent outside themselves, to receive it. Therefore, if a purchaser is not bound to pay the agent of the trustees, not being one of themselves, upon the agent producing a power of attorney from the trustees, or the purchase deed with a receipt upon it, which is now equivalent

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(1) 1 K. & J. 385.
(2) 24 Ch. D. 387.
(3) 11 Ves. 319.
(4) 5th Ed. p. 239.

(1) 24 Ch. D. 387.

to a power of attorney, in the case of a solicitor being the agent, if he is not bound when such power of attorney as the receipted deed is produced by the solicitor of the trustees to pay to him, how can he be bound to do so when one of the trustees says, "See, I have got special authority from my co-trustees to receive the moneys; I am their agent to do that which but for such authority I should not have any power to do." Why should he be bound to pay a single trustee any more than a solicitor? I do not think he is. It seems quite plain that a purchaser has nothing at all to do with the question whether the authority be a good one or not. He is not bound to investigate it. All that is before him is: The vendors are three trustees, and I shall not be exonerated unless the moneys get into their hands; I am not going to trouble myself by looking into the question whether they have given a proper authority to their co-trustee to receive it; I do not choose to embarrass myself by any inquiry on the subject; I will see that the moneys get into their hands, or, which will satisfy me equally well, I will pay them into a bank to be approved by me, to their joint account, and then I shall be completely exonerated. Would a purchaser, to use the language in *In re Bellamy and Metropolitan Board of Works* (1), be "not over-cautious, but justifiably prudent," in doing that? In my opinion he would be. It might happen that the trustees never gave any authority to their co-trustee to receive the moneys. It might happen that the circumstances might be such that the payment was a bad payment altogether as between the purchasers and the trustee. The purchasers here do not choose to be embarrassed by any question. They say, We want to make ourselves safe. *In re Bellamy and Metropolitan Board of Works* decided that they have a right to make themselves safe, that they have a right to say, We will pay these moneys in such a manner as will make us quite safe, and free us from any question as to the authority of the person who comes to receive the moneys. In my opinion these cases come within the principle of that decision, and I am bound by it. I therefore hold that the purchasers have a right to insist that the trustees should either all meet in a room, so that they can pay the moneys down on a table

(1) 24 Ch. D. 387.

in their presence, or that the trustees should name a bank where they can pay the moneys to their joint account as they have proposed to do. It was said that in no case can there be a payment to all the trustees, that if they were all to meet and the moneys were laid on a table before them all, the moneys would be taken up by one of them, and the payment would not be to all. I dissent absolutely from such a proposition. If the moneys be laid down on a table in the presence of all the trustees, that will be a payment to all of them, and if they accept the payment, what may be done with the moneys afterwards the purchasers will have no concern with. If the trustees should say to one of their number, Will you take the moneys to a bank? that would be a subsequent act to the receipt by them. The receipt is the acceptance of the moneys which were laid on the table before them. That makes the receipt by all of them, and what they may do with the moneys afterwards the purchasers are not concerned with. Then it was said that these are cases in which the circumstances shew that the purchasers ought to be satisfied with the authority given to one trustee, as one or more of the trustees reside in the country. The deeds, however, make it appear that the trustees are in *London;* but whether that be so or not, why should the purchasers trouble themselves with all these circumstances? A course was proposed which would put the trustees to very little inconvenience, namely, that the moneys should be paid to a joint account at a bank. It seems to me that no case has been made out which should compel the purchasers to run any kind or possibility of risk in the matter, and that they are justifiably prudent in insisting that the moneys should be paid as they propose, either to all the trustees meeting in a room, or to their joint account at some bank to be approved by the purchasers.

I hold that the requisition must be complied with. There will be one order on the two summonses, and the Respondents must pay the costs of the application.

Solicitors: *R. Ward*, Solicitor to Metropolitan Board of Works; *W. & J. Flower & Nussey.*

T. F. M.

KAY, J.
1884
Aug. 9, 12.

In re PORTAL AND LAMB.

[1884 P. 1859]

Will, Construction of—Devise of Cottage and Land at S.—"In their present state"—Gift of Residue of Real and Personal Estate—Subsequent Contract to purchase Mansion and Land at S.—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24 [*Revised Ed. Statutes, vol. viii., p.* 29].

Testator devised to his son *G.* for life his cottage and land at *S.* on a certain special condition that the trees should not be cut down or removed, and that the boundary fences and the plantations, &c., should be preserved "in their present state," and after the death of *G.*, to his son, with remainders over, and as to all other his freehold estate and the residue of his personal estate he gave the same to trustees upon certain trusts. After the date of the will the testator contracted to purchase from his son *G.* a mansion and about ten acres of land situate at *S.*, but the contract was not completed at the time of his death:—

Held, that the testator had not with sufficient clearness shewn, within the meaning of the 24th section of the *Wills Act,* 1837 (1 Vict. c. 26), a contrary intention, and therefore the property contracted for passed to his son *G.*

The words "in their present state" must be taken to refer to the period of death, and did not indicate an intention that after-acquired property should not pass, with sufficient clearness to amount to the contrary intention which the statute requires.

Though the words "my cottage and all my land" were not apt in a devise of a mansion and lands, yet the word "land" was quite large enough to include them.

AN adjourned summons under the *Vendor and Purchaser Act,* 1874. *George Lamb* by his will, made in 1872, said, "I give and devise unto my son *George Henry Lamb* for his life my cottage and all my land at *Stour Wood,* in the parish of *Christchurch,* in the county of *Southampton,* on the especial condition that no fir or other trees or shrubs thereon, except when actually decayed, be at any time cut down or removed, and that the outside boundary fences be kept in good preservation, and the plantations, heathers, and furze all preserved in their present state; and after the decease of the said *George Henry Lamb* I give and devise the said cottage and lands at *Stour Wood,* with their appurtenances, unto his son *Douglas George Lamb,* his heirs and assigns for ever, provided, nevertheless, that in case the said *Douglas George Lamb* shall die under the age of twenty-one years, or shall die after that age without leaving any issue him surviving, then I give and devise the said cottage and land at *Stour Wood*, with their appurtenances, unto my son *John Workman Lamb*, his heirs and assigns for ever; and as to all other my freehold manor, messuages, lands, and real estate whatsoever and wheresoever, and also as to all the residue of my moneys and personal estate whatsoever," the testator gave them to trustees upon certain trusts.

After the date of his will the testator contracted to purchase from his son *George Henry Lamb* a mansion and about ten acres of land, situate at *Stour Wood*. The contract was not completed at the time of the testator's death.

The question was whether the mansion and lands contracted for passed under the specific devise, or fell into the residue.

Hamilton Humphreys, for the trustees, who had taken out the summons, submitted that the purchased property fell into the residue, and that in such a case of a devise of "my cottage and all my land," on the especial condition that "no fir or other trees," &c., should be cut down, "and the plantations, heathers, and furze all preserved in their present state," a contrary intention was shewn which took the case out of the 24th section of the *Wills Act*, 1837 (1 Vict. c. 26). He referred to the case of *Cole* v. *Scott* (1).

Bramley, for the specific devisee, submitted that the property passed to him under the gift. The description of the property, "my cottage and all my land," was clear enough, and the words "in their present state" were not stronger than the word "now," and that alone was not sufficient to shew a contrary intention: *Wagstaff* v. *Wagstaff* (2); *In re Midland Railway Company* (3); *Dickinson* v. *Dickinson* (4).

Hamilton Humphreys, in reply.

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(1) 1 Mac. & G. 518.
(2) Law Rep. 8 Eq. 229.
(3) 34 Beav. 525.
(4) 12 Ch. D. 22.

KAY, J. 1884 *In re* PORTAL AND LAMB.

KAY, J. (after stating the facts above set forth, and reading the 24th section of the *Wills Act*, 1837), said:—

The section was intended to give effect to what has been called a generic disposition, so as to make it include all property of the kind described belonging to the testator at the time of his death. Obviously it is not necessary to the application of the section that it should be shewn that the testator intended that the after-acquired property should pass. If he had no intention on the subject, the after-acquired property will pass by force of the provision. The statute requires that the will shall shew upon the face of it a contrary intention, that is, an intention that the after-acquired property shall not pass. There are two classes of cases of which the books contain examples: one where the words are not strictly speaking generic, but really describe a particular property which the testator had at the date of his will, among which *Cole* v. *Scott* (1) may be ranked; and there Lord *Cottenham* read the will as meaning "all the freehold and leasehold estates of which the testator was at the date of his will seised and entitled," and that, as Lord *Hatherley* said in *Douglas* v. *Douglas* (2), being a reference to something specific, would not be enlarged by the provision of the statute. On the other hand, such an expression as "all the lands of which I am seised in *A.*" must be read as if written just before the testator's death: *Doe* v. *Walker* (3). So as to the word "now." Any property I now possess, read in the same manner will pass all the property possessed by the testator at the time of his death: *Wagstaff* v. *Wagstaff* (4), *Dickinson* v. *Dickinson* (5), *Everett* v. *Everett* (6), *Goodlad* v. *Burnett* (7), and *In re Midland Railway Company* (8). Reading, therefore, this will as though it had been written immediately before the testator's death, the words "in their present state," which occur in the devise, must be taken to refer to that period, and do not indicate an intention that after-acquired property should not pass with sufficient clearness to amount to that contrary intention which the statute requires. The real difficulty to my mind is to

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(1) 1 Mac. & G. 518.

(2) Kay, 400.

(3) 12 M. & W. 591.

(4) Law Rep. 8 Eq. 229.

(5) 12 Ch. D. 22.

(6) 7 Ch. D. 428.

(7) 1 K. & J. 341.

(8) 34 Beav. 525.

KAY, J.
1884
In re PORTAL AND LAMB.

determine whether in fact the gift of specific property contains general words which would pass lands subsequently acquired, or whether it is, as Lord *Cottenham* considered to be the case in *Cole* v. *Scott* (1), merely a description of certain specific property of which the testator was possessed at the date of his will. I agree with the argument that the mode of trying the question is to suppose the testator at the date of his will to have been possessed of the property which he in fact subsequently acquired, and then to consider if the words are sufficient to pass it. They certainly are not very apt words for that purpose. The testator desiring to devise the mansion and lands would hardly describe them by the terms used in the specific devise in this case. However, the word "land" is quite large enough to include them, and as the words are "all my land at *Stour Wood*," I do not see that it could be held on any true principle of construction that this property would not pass. Probably the testator had no intention in the matter. Perhaps he did intend the property to go to his son. I cannot tell. However, he has not indicated that contrary intention required by the statute with sufficient clearness to enable me to say that the property did not pass.

Solicitors: *Johnson & Weatherall*, agents for *Lamb, Brooks, & Sherwood, Basingstoke*; *Longbourne & Stevens*, agents for *Locke, Melksham*.

T. F. M.

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(1) 1 Mac. & G. 518.

CHITTY, J.
1884
July 12.

BAYNTON *v.* COLLINS.

[1870 B. 152.]

Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), s. 5—*Reversionary Interest—Accruer of Title in Possession after Commencement of Act.*

Property to which a married woman was, at the commencement of the *Married Women's Property Act*, 1882, entitled in reversion or remainder, and which since the Act has fallen into possession, is within s. 5, and may be transferred and paid to her upon her separate receipt.

PETITION.

Thomas Baynton, who died in 1820, by his will dated the 25th of July, 1818, devised his residuary real estate in trust for the benefit of his daughters, in equal shares, one of such shares being given in trust, during the life of his daughter, *Mary Farrell* (then *Mary Baynton*, spinster), for her sole and separate use, and from and after her decease in trust for the child and children of *Mary Farrell*, whether born in the testator's lifetime or after his death, share and share alike, as tenants in common, and the heirs or assigns of the same child or children in fee and not in tail, with similar limitations as to *Mary Farrell's* share of the testator's personal estate.

Various administration proceedings had been taken, and in 1870 this suit of *Baynton* v. *Collins* [1870 B. 152] was instituted for the purpose of obtaining a sale, under the *Partition Act*, 1868, of the real estate then remaining subject to the testator's will, and a division, so far as circumstances allowed, of his personal estate.

In the result of these proceedings various sums were carried over to an account entitled "The Settled Personal Estates Account. The share of *Mary Farrell* and her children," and also to the like share in the testator's residuary real estate.

Mary Farrell died on the 4th of June, 1884, leaving nine children, and this petition was presented for the purpose of obtaining a distribution of the funds standing to the account of "The share of *Mary Farrell* and her children." These funds were divisible in ninths. Two of the daughters of *Mary Farrell* (Mrs. *Farmer* and Mrs. *Geaves*) had married without settlements, before the date of the *Married Women's Property Act*, 1882, and it was proposed by the petition to pay the shares of Mrs. *Farmer* and Mrs. *Geaves*, which exceeded £500, to them upon their separate receipt.

Whitehorne, Q.C., and *P. A. Kingdon*, in support of the petition, submitted that the separate examination of Mrs. *Farmer* and Mrs. *Geaves* might be dispensed with, and their shares paid over to them upon their separate receipt, as their title in possession had accrued after the commencement of the *Married Women's Property Act*, 1882, within the meaning of sect. 5. In a sense, no doubt, the title of the married women had accrued before the commencement of the Act, *i.e.*, for a vested interest in remainder, and the husband may have had an inchoate right subject to the wife's equity to a settlement, or by survivorship if the property was not reduced into possession; but any such inchoate right is displaced by the language of sect. 5.

CHITTY, J.:—

If the *Married Women's Property Act*, 1882, sect. 5, was intended only to refer to cases of title which accrued in inception subsequently to the commencement of the Act, I am unable to see why all these words "whether vested or contingent, and whether in possession, reversion, or remainder," should have been used. There are five different kinds of title, and if any one of them accrues after the commencement of the Act, then sect. 5 will apply. Accruer of a title in possession must mean when the possession falls in. A further effect of the section, and probably one of its objects, was to give married women power to deal with their reversionary interests without the aid of *Malins' Act* (20 & 21 Vict. c. 57). I hold that the title which was in reversion or remainder at the commencement of the Act, and which has since the Act become a title in possession, is within sect. 5. Mrs. *Farmer* and Mrs. *Geaves* are therefore entitled to have their shares transferred and paid to them upon their separate receipt.

Solicitors: *Bridges, Sawtell, Heywood, Ram, & Dibdin.*

F. G. A. W.

CHITTY, J.
1884
July 7, 14.

In re WHEATLEY.
SMITH *v.* SPENCE.

[1881 W. 4829.]

Married Woman—Election—Restraint on Anticipation.

In the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable.

FURTHER CONSIDERATION.

Henry Wheatley, by his will, dated the 20th of November, 1868, gave £2000 to, and equally to be divided between, such one or more of his nephews and nieces (naming them), the four children of his deceased brother *William Wheatley*, as should survive him, and £3000 to and equally between such one or more of his nephews and nieces, the six children of his late brother *John Wheatley*, as should survive him and attain twenty-one; and, subject to the trusts and legacies aforesaid, testator directed that the trust premises or the residue thereof, with the future income, should be held upon such trusts, &c., whether the same extended to and should be an absolute or only a limited and revocable disposition thereof, and in such manner in all respects as his sister *Maria Wheatley*, whether covert or sole, should by will direct, appoint, give, and devise, "but so that every direction, appointment, gift, or devise be made in favour of some one or more of my nephews and nieces, the children of my said brothers and sister *William Wheatley*, *John Wheatley*, and *Isabella Smith*. And in case my said sister *Maria Wheatley* shall make no such direction, appointment, gift, or devise as aforesaid, then as to one moiety of the residue of the said trust premises, with the future income thereof, I direct that the same shall be in trust for and to be equally divided between my said nephews and nieces, the children of my said brother *William Wheatley*, the same as the sum of £2000 given to them, with the like proviso in favour of issue in case of any of them dying, as mentioned in the same proviso, leaving lawful issue. And as to the remaining moiety of the residue of the said trust premises, with the future income thereof, I direct that the same shall be in trust for and equally divided between my nephews and nieces the children of my deceased brother *John Wheatley*, the same as the before-mentioned sum of £3000 given to them, and also with the like proviso in favour of issue in case of any of them dying, as mentioned in the same proviso, leaving lawful issue."

Maria Wheatley, by her will, dated the 1st of June, 1870, after making an appointment in exercise of the power given to her by *Henry Wheatley's* will, directed that her real and personal estate should be held upon trust for her niece *Dorothy Ewart*, and the nieces and nephews of her sister *Isabella Smith* and her late brother *John Wheatley*, who should be living at her death, in equal shares, the shares of any niece surviving the testatrix to be settled upon certain trusts for such niece for her life, for her separate use without power of anticipation.

By a codicil, dated the 26th of August, 1871, *Maria Wheatley* revoked the appointment made by the will, and instead thereof appointed, gave, and devised the property subject to the appointment unto her sister *Isabella Smith* for her natural life, and after her death, "I appoint, give, and devise the same real and personal estate unto my nephew *William Smith* (the Plaintiff) and to my nieces *Isabella Smith* and *Margery Irvin*, the son and daughters of my sister *Isabella Smith*, and to my nieces *Dora Anne Ewart* and *Margaret Ewart*, the daughters of my niece *Dorothy Ewart*, now deceased, in equal shares, as tenants in common, and to their respective heirs, executors, administrators, and assigns, the shares of each niece being held upon such trusts as she, whether covert or sole, should by deed or will appoint, and in default of appointment upon trust for my same niece, her heirs, executors, administrators, and assigns, for her separate use, free from marital control and engagements."

The action was instituted for the administration of the estates of *Henry Wheatley* and *Maria Wheatley*; and one of the questions now raised upon further consideration was whether the children of *John Wheatley*, to whom gifts were given by the will of *Maria*

Wheatley out of her own property, and who, by the terms of *Henry Wheatley's* will (assuming that the appointment of two-fifths in favour of *Dora Anne Ewart* and *Margaret Ewart* was invalid from their not being objects of the power) were entitled in default of appointment, were bound to elect between *Maria Wheatley's* will and the two-fifths to which they became entitled in default of appointment.

Two of these children, Mrs. *McDowell* and Mrs. *Morison*, were married at the date of *Maria Wheatley's* death, and the further question arose whether, as by *Maria Wheatley's* will the gifts to them out of the testatrix's own property were coupled with a restraint on anticipation, the doctrine of election applied in their case.

C. Parke, for the trustees of Mr. and Mrs. *McDowell* :—

It is admitted that the children of *John Wheatley*, other than the two married women, are put to their election under the doctrine of *Whistler* v. *Webster* (1), but I submit that the married women, whose interests under *Maria Wheatley's* will were given subject to a restraint on anticipation, are not bound to elect. The point is unsettled. In *Willoughby* v. *Middleton* (2) Vice-Chancellor *Wood* put a married woman to her election as between property given to her for her separate use, and property to which she was entitled under her marriage settlement, for her separate use without power of anticipation; but, without finally deciding the point, the late Master of the Rolls, in *Smith* v. *Lucas* (3), expressed a very strong opinion that where a married woman was restrained from anticipation she could not under the doctrine of election make that alienable which was not alienable before.

[CHITTY, J., referred to *Codrington* v. *Codrington* (4).]

In *Robinson* v. *Wheelwright* (5) it was held that the Court had no power to release the separate estate of a married woman from the prohibition against anticipation thereto attached, so as to enable her to alienate the property subject to this restriction, though it would have been greatly to her benefit to have done so.

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(1) 2 Ves. Jun. 367.
(2) 2 J. & H. 344.
(3) 18 Ch. D. 531.
(4) Law Rep. 7 H. L. 854.
(5) 6 D. M. & G. 535.

In *Tussaud* v. *Tussaud* (1), which was decided on the question of satisfaction, Lord Justice *James* asks (2), "Can a married woman who is restrained from anticipation be put to her election?" And it has been held that not even for the purpose of recouping loss occasioned by her own fraud, or breach of trust, of which she is cognisant, can the restraint upon anticipation, in any case, or by any device, be evaded: *Clive* v. *Carew* (3); *Stanley* v. *Stanley* (4).

[CHITTY, J., referred to the observations of Lord Chancellor *Selborne* in *Cahill* v. *Cahill* (5), which he read as approving the view of the late Master of the Rolls in *Smith* v. *Lucas* (6).]

I also submit that the rule as to election is not applicable as between one clause in a will and another clause in the same will or codicil: *Wollaston* v. *King* (7). *Cooper* v. *Cooper* (8), *In re Warren's Trusts* (9), *Tomkyns* v. *Blane* (10), and the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), s. 39, were also referred to.

P. H. Lawrence, for the two children of *Dorothy Ewart*, submitted that the married women, equally with the other children of *John Wheatley*, were bound to elect. They cannot take under both the will and the appointment, and the fact that the interests given by the will are subject to a restraint on anticipation can make no difference, for election is no forfeiture of interest, "but the Court lays hold of what is devised, and makes compensation out of that to the disappointed party:" *Lady Cavan* v. *Pulteney* (11); and the disappointed legatees are entitled to keep back or sequester from the other devisees or legatees the property so bequeathed or devised until compensation is made: *Pickersgill* v. *Rodger* (12); *Gretton* v. *Haward* (13).

[CHITTY, J.:—Might not the testatrix have expressly repu-

(1) 9 Ch. D. 363.
(2) Ibid. 375.
(3) 1 J. & H. 199, 205, 206.
(4) 7 Ch. D. 589.
(5) 8 App. Cas. 420–7.
(6) 18 Ch. D. 531.
(7) Law Rep. 8 Eq. 165.
(8) Law Rep. 7 H. L. 53.
(9) 26 Ch. D. 208.
(10) 28 Beav. 422.
(11) 2 Ves. Jun. 544, 559.
(12) 5 Ch. D. 163.
(13) 1 Sw. 409, and notes thereto.

diated the doctrine of election, and has she not done so by attaching restraint on anticipation to the gifts to the married women?]

P. H. Lawrence:—The principle is that persons claiming under a will must conform to all its terms, and this duty to make compensation is a charge on the interest of the married women in Miss *Wheatley's* property, which cannot be taken at all except subject to the obligation to make good the necessary amount to the disappointed legatee: *Pickersgill* v. *Rodger* (1). And that charge to which the interest given by the will is subject overrides the restraint on anticipation, which was probably invented in order to prevent a married woman's interest from becoming forfeited. But election is based not upon forfeiture but upon compensation, and *Robinson* v. *Wheelwright* (2) is the first case in which any doubt was thrown on the application of the doctrine of election in cases where the person to elect was restrained from anticipation.

Ince, Q.C., *Macnaghten*, Q.C., *Romer*, Q.C., *Medd*, *W. G. Robinson*, and *Brinton*, also appeared in the case.

CHITTY, J.:—

In this case *Maria Wheatley* had a power of appointment under the will of her brother *Henry* in favour of certain objects and certain objects only, and by her codicil she purported to exercise the power in such a manner as to give an interest to persons who are not objects of the power. The result is that by reason of this attempt on her part to appoint to strangers, two-fifths of that fund are ill appointed. There is another fifth of the same fund which I do not deal with now for the purposes of this judgment, because that has lapsed, and there is no question of election in regard to that fifth. Under the same will there are five children of *John* who take benefits out of the testatrix's own property, and of these five children three are persons *sui juris*: *William*, who takes an absolute interest, *Martha* and *Jane*, who were spinsters at the death of *Maria Wheatley*, and are so still, and two others, Mrs. *McDowell* and Mrs. *Morison*, who were married women at the death of *Maria Wheatley*, and are so still.

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(1) 5 Ch. D. 163.

(2) 6 D. M. & G. 535.

The first point that arises is, whether inasmuch as those five persons take an interest under the trusts in default of appointment under *Henry Wheatley's* will, which entitles them to say that the appointment made by *Maria's* codicil is void as to two-fifths—whether they are put to their election. In regard to that question it has been established since the time of *Whistler* v. *Webster* (1) that the question of election does arise. It is unnecessary to go through the authorities on that point, because the law has been considered for a long time to be finally settled in regard to that matter, and it is not permissible to question it at the present day. The proposition is stated in *Sugden* on Powers (2), which is quite sufficient for my purpose, in these words: "It follows from these principles, that where a man having a power to appoint *A.* a fund, which in default of appointment is given to *B.*, exercises the power in favour of *C.*, and gives other benefits to *B.*, although the execution is merely void, yet if *B.* will accept the gifts to him, he must convey the estate to *C.* according to the appointment." In other words, *primâ facie* the five children of *John*, who take benefits under the same will, and are persons who are entitled to disappoint the person in whose favour the erroneous appointment has been made by the codicil, are bound to elect. I say, *primâ facie*, because I think there is a distinction between the case of those who are *sui juris* and that of the two married women. I should say that Mr. Justice *Pearson* in *In re Warren's Trusts* (3) did not purport really to deal with this particular proposition; and without expressing any opinion whether it was rightly decided or not, I consider that *In re Warren's Trusts* does not in the least degree stand in the way of my present decision. Then comes the question, which is one of some importance, viz., whether in regard to Mrs. *McDowell* and Mrs. *Morison*, who take life interests under *Maria Wheatley's* will, and are by the very same will restrained from anticipation, any case of election arises. It appears to me that Mrs. *McDowell* and Mrs. *Morison*, being thus restrained from anticipation, are not bound to elect.

Now the doctrine of election is thus spoken of by Lord *Cairns* in *Codrington* v. *Codrington* (1): "By the well settled doctrine, which is termed in the Scotch law the doctrine of approbate and reprobate, and in our Courts more commonly called the doctrine of election, where a deed or a will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the will without at the same time conforming to all its provisions, and renouncing every right inconsistent with them."

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(1) 2 Ves. Jun. 367.

(2) 8th Ed. p. 578.

(3) 26 Ch. D. 215.

That is a sufficient statement of the doctrine for the purposes of my judgment. The person against whom the case of election arises is bound to give effect to the whole instrument, and there is an implied condition arising out of the dispositions on the face of the will itself, that the person who takes under the instrument should renounce any independent title that person has and could set up against the instrument itself. But the question of election arises with reference to the instrument in this way. On the face of this will these two ladies are restrained from anticipation. Now it is settled that the doctrine of election does not involve forfeiture, but involves compensation. Compensation out of what? Out of the property which is given by the instrument, that is to say, arising out of the property which Mrs. *Morison* and Mrs. *McDowell* take under the will, as being property which the testatrix, *Maria Wheatley*, was absolutely entitled to. Now, can I imply on the face of these testamentary instruments any such condition as against them? I hold not, because it is on the very face of this will that they are restrained from anticipation. I put this point during the argument: suppose the testatrix had said, I give you an interest in my own property, and you are not to be put to any election by reason of my having in another part of my will disposed of your property —for that is what the attempt, the invalid attempt, to exercise the power of appointment really comes to—it would be clear there was an intention shewn on the face of the will itself that there should be no election. It appears to me when this case is considered it resolves itself into a case such as the one I have supposed. For it is the testatrix herself who has said that these two beneficiaries, Mrs. *McDowell* and Mrs. *Morison*, are to enjoy the property which she gives them as a personal provision for their inalienable use. The case, therefore, does not fall, as far as the facts are concerned, within the decision of Lord *Hatherley* in *Willoughby* v. *Middleton* (1). There the funds purported to be brought into settlement by the covenants of the husband and the wife consisted first of a reversionary interest of the wife, and secondly of her after-acquired personalty, and under the trusts of the settlement the wife took the first life interest in both funds for her separate use without power of anticipation. The wife's reversionary interest fell into possession during the coverture, and was therefore bound by the husband's covenant, but not by the wife's. The wife's after-acquired personalty accrued to her for her separate use, and was therefore bound by her covenant, but not by the husband's. Lord *Hatherley* held in these circumstances that the husband had settled the reversionary interest on the faith that the wife would give effect to her covenant (2), and to the settlement as a whole; and consequently that the implied condition of election arose as against her. That reasoning does not decide the present case. But the late Master of the Rolls in *Smith* v. *Lucas* (3) considered the point which I have to decide as still open, and not finally disposed of by Lord *Hatherley* in *Willoughby* v. *Middleton*, and he expressed a strong though not a final opinion on the point, and adverse to that decision the late Lord Justice *James* appears by his question in *Tussaud* v. *Tussaud* (4) to have thought that a married woman who is restrained from anticipation could not be put to her election. I adopt the view which the late Master of the Rolls took in *Smith* v. *Lucas*. The property, which, it is said, must be sequestered for the purpose of making compensation to the persons who have been disappointed by the failure of the appointment in their favour, is property given in such a manner that the testatrix herself must be deemed to intend that the persons to whom she gives it shall not deal with it, and that it shall not be dealt with adversely to them; and to imply a condition of election would be to imply a condition of election against the express language of this will.

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(1) Law Rep. 7 H. L. 861.

For these reasons it appears to me there is no case of election

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(1) 2 J. & H. 344.

(2) Ibid. 355.

(3) 18 Ch. D. 531.

(4) 9 Ch. D. 363.

CHITTY, J.
1884
In re WHEATLEY.
SMITH *v.* SPENCE.

arising as against Mrs. *McDowell* and Mrs. *Morison* in respect of their life interests. The will has not been stated so as to see whether they took any other interest in reversion in those shares settled on them. Any question of that kind I leave open. I rather understand that the whole of their shares are so settled that they can take no more than the life interest.

It was argued that sect. 39 of the *Conveyancing and Law of Property Act*, 1881, made a difference in this case, but it has no application whatever, because I have held that the married women thus restrained from anticipation are not put to their election.

Solicitors: *Maples, Teesdale, & Co.*, agents for *Lietch, Dodd, & Bramwell, North Shields; F. Venn & Co.; S. W. Johnson & Son*, agents for *H. A. Adamson, North Shields; Chester & Co.*, agents for *Sutton & Elliott, Manchester; Redpath & Holdsworth.*

F. G. A. W.

CHITTY, J.
1884
July 18, 22.

In re SHAW AND THE CORPORATION OF BIRMINGHAM.

[1884 S. 879.]

Artizans and Labourers Dwellings Improvement Act, 1875 (38 & 39 *Vict.* c. 36)—*Compulsory taking of Land—Arbitration Award—Payment of Sum awarded into Court—Appeal—Verdict of Jury for larger Sum—Payment of Difference into Court—Time of taking Possession—Interest on Difference.*

Where, under the provisions of the *Artizans and Labourers Dwellings Improvement Act*, 1875 (38 & 39 Vict. c. 36), a sum of money has been paid into Court by a local authority under the award of an arbitrator for lands taken compulsorily by them, and on appeal a verdict for a larger sum is given by a jury, the difference between the two sums being subsequently paid into Court, interest at £4 per cent. per annum from the date of the first payment to the date of the second payment in is payable on such difference.

THE mayor, aldermen, and burgesses of the borough of *Birmingham*, being the urban sanitary authority for the borough and the local authority under and for the purposes of the *Artizans and Labourers Dwellings Improvement Act*, 1875, under the powers of that Act made a scheme for the improvement of a certain area within the borough.

Certain freehold property was required for the purposes of the scheme, of which property the applicant *Charles James Shaw* was tenant for life, subject to a lease for a term of 116½ years from the 29th of September, 1775, at a yearly rent of £10.

Sir *Henry Hunt* was appointed by the Local Government Board to act as arbitrator under the provisions of the *Artizans and Labourers Dwellings Improvement Act*, 1875, and by his final award, dated the 16th day of June, 1880, assessed the compensation to be paid for the fee simple of the lands in question subject to the lease at the sum of £2400.

On the 31st of January, 1881, the corporation of *Birmingham* prepared under their corporate common seal a certificate stating that *Charles James Shaw* and others were absolutely entitled to the sum of £2400 awarded by the arbitrator; but *Shaw* having refused to receive such certificate, the corporation, being satisfied with the title, on the 7th of March, 1881, paid the sum of £2400 into the bank as provided by the Act, and actually entered into possession of the lands on the 31st of October, 1881.

On the 4th of April, 1881, *Shaw*, by a notice in writing in which he described himself as tenant for life in fee simple of the land in question subject to a lease, gave notice that he was dissatisfied with the amount of compensation so awarded him by the final award of the arbitrator and so paid into the bank, and that he intended to appeal and submit the question of the proper amount of compensation payable in respect of the lands to a special jury.

On the 21st of November, 1883, the corporation as the local authority issued their warrant to the sheriff to summon a jury to determine by their verdict the proper amount of compensation to be paid by the local authority for the purchase by them of the inheritance in fee simple of the lands in question subject to the lease.

On the 12th of December, 1883, the jury gave a verdict for £3200 to be paid by the local authority to *Shaw* for the purchase of his estate and interest in the land in question subject to the lease.

On the 11th of January, 1884, the corporation paid into the bank the sum of £800, making with the sum of £2400 paid in on the 7th of March, 1881, the aggregate sum of £3200, the compensation so assessed by the jury.

On the 8th of March, 1884, *Shaw* took out a summons in Chambers for the purpose of its being determined whether the corporation was bound to pay interest on the whole or any and what part of the purchase-money payable to him, and from and to what dates and at what rate such interest was payable.

The summons came on to be heard before Mr. Justice *Chitty* in Chambers on the 20th of May, 1884, when his Lordship did not think fit to make any order on the application except that the applicant should pay the costs thereof.

This was a motion on the part of the applicant to discharge the order so made in Chambers, and that the questions raised by the summons might be decided according to the terms of the application.

Romer, Q.C., and *Phipson Beale*, for the motion :—

We submit that interest is payable by the corporation on the £800, being the difference between the sum awarded by the arbitrator and that given by the jury from the date when they paid the £2400 into Court in March, 1881, to the date of the payment of the £800 into the bank. This is in analogy to the cases under the *Lands Clauses Act: Rhys* v. *Dare Valley Railway Company* (1); *In re Pigott and Great Western Railway Company* (2); *In re Navan and Kingscourt Railway Company* (3); *In re Eccleshill Local Board* (4).

Ince, Q.C., and *Methold*, for the *Birmingham* corporation :—

The Court cannot go behind the verdict of the jury. They found that the purchase-money to be paid was £3200; it must be assumed that in giving their verdict they took the question of interest into consideration and gave their verdict accordingly. The case of *In re Eccleshill Local Board* was disapproved of by the late Master of the Rolls (Sir *G. Jessel*) in *In re Pigott and Great Western Railway Company* and in *In re Navan and Kingscourt Railway Company* the railway company did not appear.

We submit that interest is not payable on the £800.

Romer, in reply.

(1) Law Rep. 19 Eq. 93.
(2) 18 Ch. D. 146.
(3) Ir. R. 10 Eq. 113.
(4) 13 Ch. D. 365.

CHITTY, J. :—

The question on this motion is whether Mr. *Shaw*, as representing the vendor, and also as representing the reversioners, is entitled to interest on a sum of £800, being the difference between the £2400 awarded by the arbitrator, and the £3200, the sum assessed by the jury, for the period which elapsed between the date of the payment of the £2400 into Court, and the date of the payment of the £800 into Court.

The £2400 was paid into Court on the 7th of March, 1881, and the £800 was not paid in until the 11th of January, 1884.

The £2400 was the amount awarded by the arbitrator. Dissatisfaction had been expressed by Mr. *Shaw* with the provisional award, and he was heard before the arbitrator, who declined to alter his award, and fixed the amount of the compensation to be paid at £2400.

The state of the title was this. Mr. *Shaw* was tenant for life with a reversion, and the interest of the reversioners was subject to a lease which had been granted in 1775, and which had but a few years to run at the date of the award. Under the lease, the rent reserved was only £10 a year, a rent far less than the annual value of the houses to be taken, and on the award it appears that all unexpired terms were calculated from Michaelmas, 1880, the effect of which would be that eleven and a half years of the lease had to run before the reversion fell into possession, and it was upon that footing that the arbitrator awarded £2400.

Being still dissatisfied, Mr. *Shaw* gave a further notice. The £2400 was paid into Court under the 20th clause of the schedule to the *Artizans and Labourers Dwellings Improvement Act*, 1875, in March, 1881, the notice of dissatisfaction had been given at a date previous to that payment in, and the notice for the jury was given a few days afterwards, namely, on the 4th of April, 1881. A delay occurred on the part of the corporation in issuing their warrant. The corporation was pressed by Mr. *Shaw's* advisers to issue the warrant, but they did not do so until the 21st of November, 1883.

Mr. *Shaw* received the rent of £10 a year from the tenant, the lessee, up to the 25th of March, 1881. Strange to say, the evidence does not disclose with preciseness at what time the corporation took possession; but it was stated and agreed to by counsel on both sides that they actually took possession on the 31st of October, 1881, having bought up the leasehold interest of the tenant for years. The exact date, however, when the corporation took possession, for the purpose of my decision, does not appear to me to be very material. Mr. *Shaw* applied for the rent that accrued due in March, 1882, to the corporation. There is a letter in evidence written from the office of the town clerk upon the question, which I must take to be written with his authority, dated the 22nd of May, 1882, from which it appears that the corporation had purchased the lessee's interest; that they had entered into possession; and being in such possession, they claimed, as against the reversioners, that they were purchasers, and accordingly exempt from the payment of rent. In other words, being thus in possession, they said that they had purchased the leasehold interest, and that they had satisfied the vendor by the payment into Court of the £2400, being the amount that was awarded; and, under the circumstances, they set up that no rent was payable by them, and no rent has been paid by them from that date.

When the matter was before me in Chambers, I understood that the corporation then offered to pay rent, and I think, on considering the matter, that the fair inference from this letter is that they were in possession by virtue of the statutory contract that had been entered into between the parties.

The warrant for the jury recites that *Shaw* being dissatisfied with the amount so awarded and paid into the bank, and such amount exceeding £500, gave notice that he was dissatisfied with the amount of the compensation awarded to him in the final award, and that he intended to appeal and submit the question of the proper amount of compensation payable in respect of the lands to a jury, and the warrant, proceeding in accordance with that notice, requires the sheriff to nominate a jury to determine by their verdict the proper amount of compensation to be paid by the local authority for the purchase of the inheritance in fee simple, and so forth.

The verdict of the jury was given on the 12th of December, 1883, and on the same day the sheriff gave judgment accordingly.

As between the vendor and purchaser in an ordinary case, where the contract makes no provision for interest, the law is settled that the purchaser pays interest from the time when he could prudently take possession; and the late Master of the Rolls (Sir *G. Jessel*) in the case of *In re Pigott and Great Western Railway Company* (1) applied that rule to the contract or quasi-contract which is created by the *Lands Clauses Act* where lands are taken compulsorily.

In *Rhys* v. *Dare Valley Railway Company* (2) Vice-Chancellor *Bacon* held that interest was payable by a railway company from the time of their taking possession of the land under their statutory powers, and not merely from the subsequent period of ascertaining the price by a verdict of the jury. That decision appears to be correct, and though the late Master of the Rolls dissented from some observations, or from a decision of the same Vice-Chancellor, in the case of *In re Eccleshill Local Board* (3), he did not express any dissatisfaction, nor, indeed, to my mind, could he have expressed any dissatisfaction, with the decision in *Rhys* v. *Dare Valley Railway Company.* The lands in the case before me have not been taken under the *Lands Clauses Acts,* but under the *Artizans and Labourers Dwellings Improvement Act,* 1875, which Act contains provisions somewhat similar, but not altogether the same, as those in the *Lands Clauses Act.* The provisions are in substance a modification of those in the latter Act. The material clauses of the schedule to the *Artizans and Labourers Dwellings Improvement Act,* 1875, are the 18th, 19th, 20th, 24th, and 26th. The 18th clause is not very happily worded, but it clearly gives a right to the corporation, or local authority, who set the Act in motion, to enter upon lands where a certificate is given in the case of a person absolutely entitled.

The 20th clause relates to the payment into Court where the person selling has not a title which enables him to sell by virtue of his interest, and apparently that clause is intended to be referred to by some expressions in the 18th clause; but the result of the clauses, applying to them the general rule of law, such as was applied by the late Master of the Rolls in the case of *In re Pigott*

(1) 18 Ch. D. 146.
(2) Law Rep. 19 Eq. 93.
(3) 13 Ch. D. 365.

and Great Western Railway Company (1), which I have already mentioned, appears to me to be this, that when the local authority has paid money into Court under the 20th clause, and when they have, as they had here, seen, approved, and accepted the title, they have the right upon that payment to enter into possession. Upon the facts before me it seems that the corporation actually entered into possession in October, 1881. And I hold (and I think to hold the contrary would be disastrous to those who set this Act in motion), that the corporation were entitled, having approved the title, to take possession on the 7th of March, 1881, the day when they paid the £2400 into Court.

The 24th clause of the schedule to the Act contains provisions which may be shortly styled a modification of the 85th section of the *Lands Clauses Act*, and there is a provision in that 24th clause with reference to the payment of interest somewhat similar to the provision which is contained in the 85th section of the *Lands Clauses Act*. And it would be strange if the local authority was entitled on making the deposit mentioned in the 24th clause to enter into possession, and was not entitled to enter into possession when they had accepted the title and paid the money into Court under the 20th clause.

The 26th clause is material to the point I have to decide. I will pick out only those portions which appear to be material, and they are these:—"The party dissatisfied (that is with the award) may submit the question of the proper amount of compensation to a jury, provided that such party give notice in writing of his intention to appeal within ten days after the cause of appeal has arisen. The cause of appeal shall be deemed to have arisen where moneys have been paid into Court, at the date of the payment into Court."

The jury are, therefore, to assess the amount which has to be paid, but the 4th sub-section of the 27th clause contains a provision to the effect that "the amount of compensation awarded by the arbitrator shall not be communicated to the jury, but they shall be required to make an independent assessment of the amount of compensation to which the party claiming compensation is entitled."

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(1) 18 Ch. D. 146.

Now, upon these provisions, what is the true function of the jury? It appears to me clear that they sit by way of appeal to determine the true amount of the compensation. They ought not to give in their verdict any interest for the period which has elapsed between the date of making the final award and the time of the verdict, and it also appears to me that they ought not to take into consideration a circumstance which was a material one in this case, that the interest of the vendor had become more valuable by reason of the shorter period that remained of the lease to which the vendor's interest was subject. I think that their function is to assess the amount of compensation to be paid as at the date of the final award.

The result, therefore, appears to me to be this, that they have substituted for the £2400 mentioned in Sir *Henry Hunt's* award a sum of £3200, and that that is the purchase-money. As a general rule, interest does not run upon a verdict, and it would not run upon a judgment for any period antecedent to the date of the judgment; but the proceeding before the jury is, to my mind, a proceeding for the purpose of ascertaining the amount of the purchase-money, and I think that the rule in regard to the payment of interest which I have mentioned in an earlier part of this judgment, applies to this case, so as in one sense to give a retrospective effect to the verdict of the jury. I think that the true mode of reading the provisions of this Act of Parliament—provisions which counsel said were so framed that the more they read them the less they understood them, though, speaking for myself, I have had no difficulty in understanding them—is that the jury say what was the proper amount the arbitrator ought to have awarded. The result, therefore, is that their verdict is a verdict in regard to the sum which ought to have been inserted in the award itself.

I have already held that the corporation were entitled to take possession at any time they thought fit after the 7th of March, 1881; and it appears to me, therefore, that interest does run on the £800 between the dates which I have mentioned, namely, the 7th of March, 1881, and the 11th of January, 1884.

The case is one of some importance, and not an easy case to argue in Chambers; and without intending to reflect in any way

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on the counsel who appeared before me, who, no doubt, did their best, I may say that it was imperfectly argued there; and no doubt there was a difficulty. At any rate my attention was not carefully called to the various provisions of the Act of Parliament which seem to me to govern this case.

I hold that interest at the rate of £4 per cent. per annum is payable on the £800 for the period I have before mentioned.

Solicitors: *Church, Rendell, & Trehane; Sharpe, Parkers, & Co.*, agents for *E. O. Smith, Birmingham.*

G. M.

CHITTY, J.
1884
July 29, 30.

In re BIRCH.
ROE *v.* BIRCH.

[1882 B. 3455.]

Executor—Devastavit—Laches.

Mere laches in abstaining from calling upon the executors to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the executors for *devastavit*, unless there has been such a course of conduct, or express authority, on his part that the executors have been thereby misled into parting with the assets, available to answer his claim.

ADJOURNED SUMMONS.

The action was for the administration of the estate of the testator, *Jeremiah Birch*, who died on the 19th of September, 1876, having by his will, dated the 22nd of December, 1871, appointed the Plaintiffs, *Edgar Roe* and *Lionel Chapman*, and his widow, the Defendant *Mary Ann Birch*, executors of his will.

By his will the testator desired that his widow should have the use of all his household furniture, plate, and effects for her natural life or widowhood, and that during such period the farms occupied by him at the time of his death should (if the owners thereof for the time being should permit) be carried on by the Plaintiffs, or the survivor of them.

At the time of his death the testator was tenant from year to year of a farm of 135 acres at *Swilland*, and owner, subject to mortgages thereon, of a farm at *Otley* of eighty-three acres, which had been purchased by him after the date of his will.

The executors carried on the farming business of the testator from his death in September, 1876, until October, 1881, and for that purpose obtained advances from their bankers from time to time. After 1877, owing to adverse seasons and agricultural depression, losses were incurred, and early in 1880 the executors presented a petition for the opinion and direction of the Court under 22 & 23 Vict. c. 35. From the statements in this petition it appeared that a debt of £920 (including therein a balance of £183 remaining due from the testator) was owing to the bankers, but no mention whatever was made of a debt of £700 due from the testator upon promissory notes to *John Cutting*, the present applicant. By an order of the 5th of March, 1880, Vice-Chancellor *Malins* expressed his opinion that the executors ought forthwith to give notice to the owner to determine the tenancy of *Swilland* farm, and to let the farm at *Otley* as soon as a proper tenant could be found, and that when the farms were given up they ought to sell the farming stock, and out of the proceeds pay the debt due to the bankers.

The tenancy of the *Swilland* farm was determined on the 11th of October, 1881. No tenant could be found for the *Otley* farm, and in October, 1881, the mortgagee entered into possession, and had endeavoured, but failed, to sell the farm.

In October, 1881, the executors sold the farming stock, and out of the proceeds paid the debt due to the bankers in respect of the advances made to enable the executors to carry on the farming business after the testator's death, a small balance only being left.

With respect to *Cutting's* claim the circumstances were as follows:—

At the time of his death the testator was indebted to *John Cutting*, a farmer, upon his promissory notes in the sum of £700. On applying to the executors *Cutting* was informed by them that it was their wish to continue the farming business of the testator for the benefit of his widow, and that there were ample assets in their hands to defray all debts and liabilities upon the estate, and upwards of £1000 to spare. They suggested that

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under the circumstances *Cutting* should permit payment of the £700 to stand over and not compel payment, and that they should continue to pay interest, at the same time assuring him that the debt would be secure, and he would be ultimately paid in full, with interest in the meantime. It appeared that he proposed that the executors should give him their promissory note for payment of the £700 in place of the notes that he held, but this the executors declined to do, telling him (as they alleged) that the estate was liable for the amount, and that he could call in the money, and that if he did so they would realise the estate, and out of the proceeds pay the debt. Upon the faith of their assurances (as he alleged) and having no immediate occasion for the money, *Cutting* forbore to take steps to enforce payment of his debt until April, 1881, when he called in his debt and gave the executors formal notice to pay the same within seven days.

In October, 1881, *Cutting* was informed by the executors that after paying the bankers there would be nothing (or not much) left for him.

On the 6th of May, 1882, *Cutting* issued a writ in the Queen's Bench Division against the Plaintiffs and the Defendant (the executors) to recover the £700, and £42 12*s.* 3*d.* then due for interest.

In June, 1882, *Roe* and *Chapman* commenced an action for administration, to which the widow was made a Defendant; and on the 7th of July, 1882, an order was made that the action in the Queen's Bench Division be transferred to the Chancery Division, and the conduct of this action was given to *Cutting.*

In March, 1883, an inquiry was directed to be added to the administration order: whether the assets of the testator which came to the hands of the executors, or were applicable to pay the debt of £700, or any and what part of such assets, were appropriated and disposed of, otherwise than in being realized and in paying such debt, at the instance, or with the consent, or through the laches of the said *John Cutting*, and whether *Cutting*, in any, and if any what, way misled the executors and induced them to refrain from realizing such assets and paying such debt.

In answer to this inquiry the Chief Clerk, by his certificate filed the 10th of December, 1883, found that the farming stock, &c., the assets of the testator, which came to the hands of Plaintiffs and Defendant as executors after his death, or were applicable to pay the debt of £700 due from testator to *John Cutting*, were, with the consent or by the laches of *John Cutting*, appropriated and disposed of otherwise than in being realized and in paying his debt, and that *John Cutting* misled the Plaintiffs and induced them to refrain from realizing such assets and paying such debt, such assets being sufficient at testator's death for that purpose.

This summons was thereupon taken out by *Cutting* (and adjourned into Court) for the purpose of varying the certificate by striking out and disallowing the finding, and finding in lieu thereof that there was no such consent or laches on the part of the applicant, and that he did not mislead and induce the Plaintiffs as alleged.

There was some conflict of testimony as to what had taken place between the executors and *Cutting* as to this debt of £700: the executors raising the case by their affidavits that *Cutting* was distinctly told in 1878 that he could call in the money, and that if he did so the executors would realize the estate, and out of the proceeds pay the debt, but that notwithstanding this invitation, *Cutting* did not then call in the debt, or in any way apply for payment, and thereby induced them to believe that he wished the farming business to be continued by them, and that the £700 should remain invested on the security and at the risk of such business.

They also asserted, and this was not denied, that *Cutting* was informed of the petition for advice, which gave him notice of the debt to the bank, and that, in fact, he saw it in March, 1880, and made no objection.

Cutting, however, denied that the executors ever requested him to call in the debt: on the contrary, they were always anxious, and on one occasion, about 1879, expressed a hope that he would not do so, which, at personal inconvenience to himself, and placing implicit confidence in the Plaintiffs' statement that he was quite safe, and in their promises to pay, he had abstained from doing.

Ince, Q.C., and *Oswald*, in support of the summons :—

There has been nothing on the part of *Cutting* to deprive him of his right to recover his debt, and to charge the executors with *devastavit* for having parted with the assets available for payment. Mere negligence in not insisting upon calling in the debt is not sufficient : *In re Baker* (1).

Whitehorne, Q.C., and *Round*, for the Plaintiffs, in support of the certificate :—

We do not contend that a creditor by merely not insisting upon payment of his debt would lose his right to recover from the executors in respect of their *devastavit* in parting with assets available towards payment of his debt; but we say that upon the evidence, which shews clearly that *Cutting* heard that the executors were borrowing money to carry on the business, and took no steps to call in his debt, his conduct has been such as to mislead the executors and induce them to abstain from realizing the estate for the purpose of satisfying his debt. He is therefore precluded from complaining of an insufficiency of assets : *Richards* v. *Browne* (2); *Jewsbury* v. *Mummery* (3).

William Joyce, for Defendant, the testator's widow :—

The laches shewn by *Cutting* in not enforcing his claim deprives him of any right to complain that the assets have not been applied in payment of his debt : *Stroud* v. *Stroud* (4).

[CHITTY, J. :—Laches means doing nothing. There must be something more than merely doing nothing to destroy the creditor's right.]

He also cited *Williams* on Executors (5).

Ince, in reply :—

Cutting was misled by the statement of the executors that they considered that the farming stock would be sufficient to pay his debt and other claims upon the estate.

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(1) 20 Ch. D. 230.

(2) 3 Bing. N. C. 493.

(3) Law Rep. 8 C. P. 56.

(4) 7 Man. & G. 417.

(5) 7th Ed. p. 1974.

CHITTY, J. :—

A creditor does not lose his right to sue the executors and to recover from them, by mere laches. If any authority was wanted for such a proposition it is to be found in *In re Baker* (1). But if the creditor misleads the executors so that they are thereby induced to part with the assets in a manner which would be a *devastavit*, then the creditor cannot complain of the *devastavit*. That I take to be the true meaning of the proposition to be found in *Jewsbury* v. *Mummery* (2) and *Richards* v. *Browne* (3). In both those cases the law is only stated by way of *dictum*, because the decision was in favour of the creditor. Lord Chief Justice *Tindal* says (4): "On the first point, I admit that if in the distribution of assets a creditor does mislead an executor, either by laches or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets." The meaning, I think, of Lord Chief Justice *Tindal* is quite plain. Although he uses the term "laches," he does not mean that the mere doing nothing will deprive the creditor of the right to complain of the *devastavit*, but he means that there is something more than mere laches; and I should prefer to use the word "conduct," so that the sentence should run, "either by conduct or express authority." Laches, no doubt, enters into the proposition of the Chief Justice —that is the doing nothing; but it means something more than that, that is, that there is some communication, or that some circumstances take place, from which an inference may be drawn which brings up the case fairly to express authority. Where there is express authority then the question is beyond all doubt, but there must be some laches which amounts, and points in the result, to such authority. Lord Chief Baron *Kelly* states the law in *Jewsbury* v. *Mummery* (5): "If the defendant could have shewn before the arbitrator that, though assets had come to his hands, he had parted with them under circumstances which precluded the plaintiff from alleging that they had not been duly administered, clearly that would have been a defence under

(1) 20 Ch. D. 230.
(2) Law Rep. 8 C. P. 56.
(3) 3 Bing. N. C. 493.
(4) Ibid. 499.
(5) Law Rep. 8 C. P. 60.

the plea of *plene administravit*. Therefore one of two things must have been the case; either the evidence upon which the defendant now seeks to rely was not offered before the arbitrator upon the plea of *plene administravit*, and then the issue on that plea was rightly found against the defendant; or, if offered, the arbitrator must have considered that the facts proved did not amount, as against the plaintiff, to a due administration of the assets that had come to the defendant's hands." Baron *Channell* states a similar proposition at p. 61: "Now, if the defendant could rely upon the fact that such misappropriation took place at the plaintiff's request, or under circumstances in which the plaintiff had misled the defendant into so applying them, it is clear that this would go to shew that these sums of money were not, as between the plaintiff and the defendant, assets in the hands of the defendant." The present Lord *Blackburn* merely quotes the passage which I have read from the judgment of Lord Chief Justice *Tindal*. Now that being the law upon the subject, it seems to me the question I have to decide is really one of fact. His Lordship then proceeded to state the facts, observing that the debts incurred by the executors in carrying on the business could not, of course, have been proved for in the administration of the estate under an ordinary decree, but were debts which could only have been brought in as debts against the executors, so that the creditor really stood in the shoes of the executors to the extent that the executors had the demand over against the estate in respect of the administration. The sale took place in pursuance of an order made on the petition for advice presented by the executors to the late Vice-Chancellor *Malins*. In that petition the executors, who were responsible for all the statements therein contained, stated that the debts had been paid, well knowing that *Cutting*'s debt had not been paid, and that was an error. Nothing legally turns upon it beyond this, that the executors say they shewed *Cutting* the petition, and that he made no objection to it. That, of course, is not pretended to be any defence to the present demand. But *Cutting* says he was not aware that the executors were borrowing money in the business until some time in 1881, and this point is made use of against *Cutting* to shew that he was aware in 1880 that they were borrowing money for the business. He only became aware of it at the time when the executors proposed to sell the business, and it cannot for a moment be said, as against *Cutting*, that the knowledge that he had of that petition, and of the order which was made upon it, affected his right in any way; or that merely reading the petition with the knowledge that the executors were going to sell, was any consent on his part, or any act done by him which misled the executors into believing that they might carry on the business. I am therefore brought back to the conversations which passed between the parties. Here there is a conflict of testimony; the burden of proof is wholly upon the executors, and they must establish their defence. Now I cannot find, in any evidence of the Plaintiffs, any express statement by *Cutting* to this effect: "Do not realize the business, but carry it on"—though I am asked to infer that from various statements that are made. It is plain that the assets at the death of the testator were sufficient for payment of this debt, and it was so stated to *Cutting*, as I have said, and truly stated to him. On the evidence, I think *Cutting* had no reason to believe, until he had notice of the petition, that the assets had become insufficient by carrying on the business. It is clear that he made his demand very soon afterwards. The only effect of his seeing the petition was that he was aware they were going to sell, and he does not make a demand immediately because, probably, he considered it was not a neighbourly thing to press for payment until they had got the means of payment by a sale. [His Lordship, after referring to the affidavits as to these conversations, proceeded:—]

Now the result of that appears to me to be simply this, that he was pressing for his debt and pressing for a promissory note from the executors, not telling them that they were not to be held personally liable for any debt which they might incur by their carrying on the business, and that he did not—it is not stated that he did—in terms assent or consent to the business being carried on. It appears from the affidavits of the executors, from beginning to end, that they thought it was the duty of the debtor if he wanted his money to call it in; whereas it was their duty to pay him, having assets to do so. From that they seem to have drawn an inference that he consented to the business being carried on. I think it would be a very dangerous thing to hold, under these circumstances, that the creditor had lost his right, because if I were so to hold it would prevent a creditor acting with reasonable indulgence towards those who were interested beneficially in the assets of the testator. It would compel him to press for payment in numerous cases, when he might say, "I will take my chance, I will not do anything; I do not know what you are doing; I do not assent, nor do I dissent from it, but you may go on." And, to my mind, it would be a hard thing, not upon the creditor, but upon the executors and the persons beneficially interested in the estate under the executors, if I were to hold that upon such facts as are now before me there was sufficient to require the creditor to press for payment. It would be compelling him to do that which would ordinarily be termed, if the case were inverted, a harsh course, a thing which, I think, ought to be avoided.

The Plaintiffs sum up their case in their affidavit thus: "By not calling in the debt in spite of such repeated invitation on our part, *Cutting* induced us to believe that he wished the farming business to go on." *Cutting* had no interest in wishing the farming business to go on: the only thing that can be said was, that by not enforcing payment of the debt he was receiving 5 per cent. interest. That is a comparatively small matter, and the case is not such as to call for interference. Where there is a doubt about the sufficiency of the assets, and the executor says, "I doubt whether there will be enough to pay you, but will you take the chance; let me go on with the business and I think I shall be able to make enough"—that is a very different thing. In that case it would be quite clear that the creditor would have got nothing. I think, in the result of the case, there has not been any misleading, or any consent which has deprived him of his right. The costs of this application will be costs in the action.

Solicitors: *Rhodes & Son,* agents for *Porter, Ipswich; W. Holcomb.*

F. G. A. W.

CLEMENT *v.* CHEESMAN.

[1883 C. 3221.]

CHITTY, J.

1884

July 30.

Donatio mortis causâ—Cheque payable to Donor or Order.

A cheque payable to the donor or order and, without having been indorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order, and, following *Veal* v. *Veal* (1), will pass to the son by way of *donatio mortis causâ.*

FURTHER CONSIDERATION.

Two cheques for £277 12*s.* 7*d.* and £132 8*s.* 4*d.*, payable to the testator or order, were given by the testator during his last illness to his son, the Plaintiff. The cheques had not been indorsed by the testator.

The question was whether there was a valid *donatio mortis causâ* by testator to the Plaintiff of such cheques.

Romer, Q.C., and *Gaselee,* for the Plaintiff:—

Cheques in the possession of the donor and payable to himself or order, as distinguished from cheques drawn by the testator on his banker, may, like promissory notes or bills of exchange payable to the donor or order, be the subject of a *donatio mortis causâ,* and though not indorsed will pass thereby: *Veal* v. *Veal* (1); *Rankin* v. *Weguelin* (2); *In re Mead* (3).

Whitehorne, Q.C., and *J. Sayer, contrà,* contended that there was no valid *donatio mortis causâ.* A cheque is a mere order to obtain a certain sum of money, and the authority to act upon it, especially when, as here, it is unindorsed, is withdrawn by the donor's death: *Hewitt* v. *Kaye* (4).

Ince, Q.C., and *F. Kingsford,* for other parties.

CHITTY, J.:—

I have no doubt about this case. The subject-matter was not the testator's own cheque, but was his property, being the cheque

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(1) 27 Beav. 303.

(2) Ibid. 309.

(3) 15 Ch. D. 651.

(4) Law Rep. 6 Eq. 198, 200.

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of another man, which he had taken for value. In *Byles* on Bills (1) it is stated that a cheque drawn by the donor upon his own banker cannot be the subject of a *donatio mortis causâ*, because the death of the drawer is a revocation of the banker's authority to pay. But when the donor is dealing with the cheque of another man it stands entirely on the same footing as a bill of exchange or promissory note, which, according to *Veal* v. *Veal* (2), may well be the subject of a *donatio mortis causâ*. For this purpose there is no difference between the cheque of another man and a bill of exchange or promissory note. I hold, therefore, that these cheques passed to the son by way of *donatio mortis causâ*.

Solicitors: *Kingsford, Dorman, & Co.*, agents for *Phillips & Cheesman, Hastings.*

F. G. A. W.

CHITTY, J.
1884
Aug. 8.

CONOLAN *v.* LEYLAND.

[1880 C. 326.]

Married Woman—Separate Property—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1 (3) *and* (4)—*Order of Reference by Consent.*

Sect. 1 (3) and (4) of the *Married Women's Property Act,* 1882, have not a retrospective operation so as to include contracts entered into by a married woman before the date of the commencement of the Act.

But an order made after the commencement of the Act by consent in an action by a creditor against a married woman in respect of her contract before the Act, by which order all questions under the contract were referred to an arbitrator, and the parties bound themselves to abide by, obey, perform, and keep the award, is an agreement by the married woman after the commencement of the Act, within sect. 1 (3), and therefore by sect. 1 (4) any separate estate which she had at or after the date of such agreement is liable to pay the amount found by the award to be due from her under the contract.

MOTION.

Prior to, during, and since 1879, the Defendants, Mr. and Mrs. *Leyland*, lived apart, and in June, 1879, a separation deed was executed by them, under which Mr. *Leyland* covenanted that he would, during the life of Mrs. *Leyland*, pay to *Thomas Sutherland* the sum of £2000 per annum, to be held on trust for Mrs. *Leyland* for her sole and separate use.

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(1) 12th Ed. p. 176.

(2) 27 Beav. 303.

In the early part of that year Mrs. *Leyland*, while on a visit to the Plaintiff and his wife, proposed that she should make his house her home, and that for this purpose he should take a larger house for their joint occupancy, upon certain terms as to contributing to the expenses, which, not having been reduced into writing, were differently stated by the Plaintiff and the Defendant.

Pursuant to this agreement, the Plaintiff took a house for three years from the 31st of March, 1879, but the expenses of the joint establishment proving very heavy, the arrangement was terminated on the 1st of October, 1879, and exclusive possession of the house was then given up to Mrs. *Leyland*. The Plaintiff had furnished Mrs. *Leyland* with an account of the expenses of the establishment upon which he claimed a balance of £162 7*s.* 9*d.*, and this action was brought against Mr. and Mrs. *Leyland* and the trustee of the separation deed of June, 1879 (*Thomas Sutherland*), claiming a declaration that the agreement was binding on the separate property of Mrs. *Leyland*, and that her separate estate vested in her or in *Thomas Sutherland* in trust for her, was chargeable with payment of the £162 7*s.* 9*d.*, and interest; and payment by *Sutherland* of such sum out of the moneys received by him, or coming to his hands for the separate use of the Defendant Mrs. *Leyland*.

By her statement of defence and counter-claim Mrs. *Leyland* contested the accuracy of the account furnished to her by the Plaintiff; denied that £162 7*s.* 9*d.*, or any part thereof, was owing from her to the Plaintiff, but on the contrary, asserted that the Plaintiff was indebted to her in the sum of £240, which she claimed by counter-claim. She also denied that the Plaintiff made any disbursements at her request or for her benefit or use, or on the faith or credit of her separate estate.

By an order made in the action when it came on for trial on the 25th of April, 1883, it was by consent ordered that it be referred to the award of *J. E. Paget*, one of the district registrars of *Liverpool*, to ascertain whether the agreement made between the Plaintiff and the Defendant, Mrs. *Leyland*, was in the terms set up by the Plaintiff, or in the terms set up by the Defendant, and what were the terms thereof. And the arbitrator was to take the accounts between the parties on the footing of such agreement, and was to award and certify what was due from one party to the other. And by the like consent it was ordered that the arbitrator should have all the powers as to certifying and otherwise of a Judge of the High Court. And by the like consent the costs of the action were to abide the result of the said accounts, and the costs of the reference and of the award were to be in the discretion of the arbitrator; and by the like consent that the parties did and should on their respective parts in all things stand to, abide by, obey, perform, fulfil, and keep the award, &c., of the arbitrator so to be made and published, and that no action was to be brought by either party against the arbitrator for any matter or thing he should do in or touching the question thereby referred to him.

By his award, dated the 15th of January, 1884, the arbitrator had found and awarded that the agreement between the Plaintiff and the Defendant, Mrs. *Leyland*, was in the terms set up by the Plaintiff. And having taken the accounts on the footing of such agreement, he awarded and certified that the sum of £70 11*s.* 7*d.* was at the commencement of the action and still was due from Mrs. *Leyland* to the Plaintiff, and as to the costs in his discretion, (which had been taxed at £197 10*s.* 2*d.*) he directed that they should be borne and paid by Mrs. *Leyland.*

The Plaintiff now moved that the Defendant, Mrs. *Leyland*, might be ordered to pay to the Plaintiff the sum of £70 11*s.* 7*d.* awarded and certified to be due from her to him, and also £197 10*s.* 2*d.*, the taxed costs of the Plaintiff, of the action and of the reference with interest; and that it might be declared that the separate property of the Defendant, Mrs. *Leyland*, vested in her or in the Defendant *Sutherland*, or any other person in trust for her, was chargeable with payment of such sums and interest, and the costs thereinafter directed to be paid, and that the same were payable thereout; and that the Defendant *Sutherland* might be ordered to pay to the Plaintiff the two several sums and interest and costs, out of any moneys in, or hereafter coming into, his hands as part of the separate estate of the Defendant, Mrs. *Leyland*. The motion also asked for the appointment of a receiver of the separate estate of Mrs. *Leyland*, or that (if necessary) an inquiry might be directed of what such separate estate consisted on the 27th of April, 1880 (date of issuing the writ), and on the 15th of April, 1884, and in whom it was then, and now vested, and of what it now consisted, and whether there had been any and what disposition thereof or dealings therewith by the Defendant, Mrs. *Leyland*, since the dates aforesaid; for liberty to sign judgment against the Defendant, Mrs. *Leyland*, and to issue execution against her separate estate for such sums and interest and costs; and that the Defendant, Mrs. *Leyland*, ought to be ordered to pay to the Plaintiff his costs of this motion.

In support of the motion the Plaintiff had made an affidavit to the effect that the Defendant, Mrs. *Leyland*, was possessed of furniture and other household goods and effects of considerable value now in a dwelling-house occupied by her; and that she was also possessed of valuable jewelry and other personal effects of considerable value, and that such furniture, jewelry, and effects belonged to her as her separate property, and were of sufficient value to satisfy the sums of £70 11*s.* 7*d.* and £197 10*s.* 2*d.*, the Plaintiff's taxed costs of action and of the reference, which said sums were still due and unsatisfied.

Ince, Q.C., and *MacConkey*, in support of the motion:—

We are entitled to an order for payment by Mrs. *Leyland* of the sums which have been certified by the award to be due from her, and to a declaration of charge upon all separate property, not only on that which she was possessed of or entitled to at the date of the contract, but also on all that has been subsequently acquired.

The *Married Women's Property Act*, 1882, s. 1 (3) and (4), is not confined to contracts entered into after the passing of the Act, but has a retrospective as well as a prospective operation, so as to entitle a creditor who has secured his debt by a judgment to realize it whenever he can find separate estate out of which to satisfy it: *Brown* v. *Morgan* (1). But in any case Mrs. *Leyland*, who appeared separately in the action, by consenting to perform

(1) 12 L. R. Ir. 122.

the award directed by the order of the 25th of April, 1883, which was made in her presence and with her consent, thereby entered into a new contract after the commencement of the Act (1st January, 1883) to pay the amount that might be found due from her, so that sect. 1 (3) and (4) apply. An order by consent in an action has all the incidents of, and may be enforced as, a contract, including the right of action for non-performance of the award: *Wentworth* v. *Bullen* (1); *Lievesley* v. *Gilmore* (2). Being in the position of an unmarried woman, she made herself liable for the amount that might be awarded, and the Plaintiff is entitled to issue execution: *Williams* v. *Mercier* (3). He is also entitled to recover his costs, which, with the Defendants' consent, were to abide the result of the award. And quite independently of the *Married Women's Property Act*, a married woman cannot have the benefit of a litigation and then repudiate her liability. She may be ordered personally to pay costs: *Pemberton* v. *M'Gill* (4); *Morris* v. *Freeman* (5); *Besant* v. *Wood* (6); is liable to be taken in execution for such costs, and a writ of *ca. sa.* against her would be a good writ: *Newton* v. *Boodle* (7). And in this Division the order may be enforced by the appointment of a receiver, until the payment of the amount found due by the Taxing Officer's certificate and the costs of the application, without separate proceedings to enforce the demand against her separate estate: *In re Peace and Waller* (8).

Romer, Q.C., for the Defendants:—

At the date of the contract of March, 1879, which preceded the separation deed, Mrs. *Leyland* had no separate property, and the *Married Women's Property Act*, 1882, is not retrospective so as to bring contracts entered into by a married woman before the commencement of the Act within the provisions of sect. 1 (3) and (4) and bind separate property which she may acquire after the date of the contract. This is clearly shewn by the language of sect. 1 (3) and (4), which is expressly confined to future contracts. Next, the order of reference, which was made by consent, cannot be said to amount to a fresh contract after the commencement of the Act so as to bring the case within the provisions of sect. 1. How is it to be inferred that she intended to extend her liability by entering into a new contract? Her contention was that under the agreement of 1879 the Plaintiff had been overpaid, and all that was intended by the consent to the reference was that she was to be liable to the extent of the old contract, but not any further. At all events it was not in any sense a contract within the meaning of the *Married Women's Property Act.*

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(1) 9 B. & C. 840.
(2) Law Rep. 1 C. P. 570.
(3) 9 Q. B. D. 337.
(4) 1 Jur. (N.S.) 1045.
(5) 3 P. D. 65.
(6) 12 Ch. D. 605, 630.
(7) 4 C. B. 359, 365, 369.
(8) 24 Ch. D. 405.

[Chitty, J.:—What do you say to the cases at Common Law cited on the other side, that a married woman is personally liable to an execution for costs, and that the writ of *ca. sa.* can be issued against her?]

The Courts simply gave the order for what it was worth, and if she had no separate property it could not be enforced. In Chancery it was the invariable practice not to make a married woman personally liable for costs, but merely to charge them on her separate estate, which was liable to the principal claim in the action. *Besant* v. *Wood* (1) is in my favour as to costs.

Chitty, J.:—

The first point to be determined in this case is whether sect. 1 (4) of the *Married Women's Property Act*, 1882, is retrospective or not. The words are: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." In this case before me, the contract was made before the time limited for the commencement of the Act. As the law stood then, her contract bound only such separate estate as she had at the date of the contract. It is not clear whether she had then, or now has, any separate estate, but I will assume that she had none at the time of entering into the contract. In my opinion, sect. 1 (4) is not retrospective, as the words "shall bind," &c., are words of

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(1) 12 Ch. D. 605, 630.

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futurity, and are not sufficiently strong to impose a new obligation on married women, and to displace the general rule that a statute is prospective unless expressly stated to be retrospective. The Act refers to future and not to past contracts, and the words "every contract" are not, in my opinion, sufficient to include contracts entered into by her before the Act came into operation. Moreover, sect. 1 (1), (2) and (3) are clearly clauses referring to future capacity, and it would be strange if a retrospective clause were to be found amongst prospective clauses. But then it was contended that the order by consent of April, 1883, amounted to a new contract on the part of the married woman after the commencement of the Act, to pay what should be found due from her. She appeared to and defended the action separately, and in the action the order of April, 1883, was made by consent. The question is whether or not this was a contract on the part of the married woman. It was clear that a contract may be embodied in an order of reference, for, as was said in *Wentworth* v. *Bullen* (1), the contract of the parties embodied in the consent order was not less a contract, and subject to the incidents of a contract, because there was superadded the command of the Judge. It was suggested that this was a mere *dictum*, but in *Lievesley* v. *Gilmore* (2) Chief Justice *Erle* says (3), "I think the opinion expressed by *Parke*, J., in *Wentworth* v. *Bullen*, in what was really a considered judgment rather than a *dictum*, was perfectly correct." I think that it was a new agreement on the part of the married woman after the commencement of the Act, and that I am not straining the effect of the order in saying so. The question cannot depend on whether she had or had not any separate estate at the time of entering into the original contract.

If there was a new contract, and consistently with *Wentworth* v. *Bullen* I am warranted in holding that this was a contract by Mrs. *Leyland* after the date of the commencement of the Act, then sect. 1 (3) is applicable, and it is to be deemed to be a contract entered into by her with respect to and to bind her separate property, and therefore, by sect. 1 (4), any separate estate which she had at or after the date of such agreement, is liable to pay the amount found to be due from her under the contract, and is liable to be taken in execution under the judgment. But neither sect. 1 (3) or (4) can, in my opinion, be said to be retrospective in the sense of applying to contracts made previously to the date of the commencement of the Act. I may add that sect. 1 (2) and (5) may be particularly referred to as confirming the view I take with regard to (3) and (4), these being plainly, from their language, clauses conferring future capacity on married women.

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(1) 9 B. & C. 840, 850.

(2) Law Rep. 1 C. P. 570.

(3) Law Rep. 1 C. P. 573.

MINUTE OF ORDER:—Order payment of the sums of £70 11*s.* 7*d.* and £197 10*s.* 2*d.* as asked, and also payment of the costs of this application, with a declaration that the Defendant, Mrs. *Leyland*, is bound to pay these sums and the costs out of her separate estate generally, without regard to the time when it was acquired.

Solicitors: *W. W. Wynne & Son*, agents for *Evans, Lockett, & Co., Liverpool; Simpson & North, Liverpool.*

F. G. A. W.

ROLLS *v.* SCHOOL BOARD FOR LONDON.

[1884 R. 1472.]

CHITTY, J.
1884
Aug. 1, 11.

Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 19, 20, 22—*Compulsory Purchase of Lands—Agreement for Exchange with Third Party prior to Notice to Treat.*

A School Board served on *R.* the customary notice to treat for land belonging to him, all the requisite preliminaries required by the *Elementary Education Act,* 1870, having previously been complied with.

Prior, however, to the service of such notice to treat and to the passing of the *Confirmation Act* as required by the above Act, the Board had entertained and adopted, subject to the sanction of the Education Department, a proposal from one *B.*, a neighbouring landowner, for exchanging a portion of the land to be acquired by the Board from *R.* for a piece of *B.'s* land, he undertaking to form the land so to be conveyed to him by the Board into a public road. There was evidence to shew that such road, when made, would be advantageous to the school intended to be erected:—

Held, on motion by *R.* for an injunction to restrain the Board from putting in force their statutory powers with respect to so much of the land comprised in the notice to treat as they proposed to convey to *B.*, that the Board were justified in the course they had taken, and could, if they obtained the sanction of the Education Department, carry out the proposal.

IN the month of August, 1883, the Defendants gave the Plaintiff notice that they required to purchase and take for the purposes of the *Elementary Education Act*, 1870, certain lands and hereditaments belonging to him in the parish of *Camberwell*, in the county of *Surrey*.

The preliminary notice describing the object for which the Plaintiff's land, together with land belonging to other owners, was proposed to be taken, had been duly published pursuant to sub-sect. 2 of sect. 20 of the above Act. The object for which the land was proposed to be taken was stated on such notice to be "for the purposes of erecting on the said pieces or parcels of land school-houses, in which public elementary schools may be carried on, and for the enlargement or improvement of existing school-houses and premises already provided by the said School Board for *London*."

The School Board for *London* had also presented a petition under their seal to the Education Department, praying that an order might be made authorizing the School Board to put in force the powers of their Acts with respect to the purchase and taking of lands otherwise than by agreement, so far as regarded the lands mentioned in the petition, which included the Plaintiff's land, and the Education Department having inquired into the matter made the order prayed for, and the same was confirmed by the *Education Department Provisional Order Confirmation* (*London*) *Act*, 1883.

Prior to the service of the notice to treat, and of the passing of the *Confirmation Act* above mentioned, the School Board had under their consideration a proposal by one *Bird*, a neighbouring landowner, for exchanging a portion of land belonging to him for a strip of the Plaintiff's land when the same should be acquired by the Board, one of the conditions of such exchange being that *Bird* should form the land acquired by him from the Board into a road and dedicate it to the public. This proposal was, subject to their obtaining the consent of the Education Department, adopted by the School Board.

This was a motion on behalf of the Plaintiff for an injunction to restrain the Board, their agents, contractors, and servants, from putting in force any of their statutory powers with respect to the purchase or taking, and from purchasing or taking, and from continuing in possession of the land of the Plaintiff included in the notice to treat other than and except such part thereof as the Board properly required for the purpose of providing sufficient public school accommodation, and, in particular, such part of the said land as they proposed to convey to *Bird* for the purpose of enabling him to construct a road thereon.

Macnaghten, Q.C., and *Renshaw*, in support of the motion:—

School Boards have no power to purchase land at all except for the purpose of providing sufficient school accommodation, and they have no power to take land compulsorily except for the object declared in their published notice, upon the faith of which Parliament clothes them with that power. The Legislature intended that landowners should only be compelled to part with their land for strictly educational purposes approved of by the Education Department.

Bird can make what arrangements he pleases with the Board with regard to his own land, but Parliament never intended that *A.*'s land should be taken compulsorily in order that satisfactory arrangements should be made with *B.*

If the Board had stated in their petition what they were proposing to do, the Education Department would not have made the order.

The Board being authorized by the Legislature to take our land for a definite object is attempting to take it for another object, and will be restrained by the Court from so doing: *Galloway* v. *Mayor and Commonalty of London* (1); *Lord Carington* v. *Wycombe Railway Company* (2).

They also referred to *Traill* v. *Baring* (3); *Vane* v. *Cockermouth, Keswick, and Penrith Railway Company* (4); *Stockton and Darlington Railway Company* v. *Brown* (5).

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(1) Law Rep. 1 H. L. 34.

(2) Law Rep. 2 Eq. 825; affirmed Law Rep. 3 Ch. 377.

(3) 4 D. J. & S. 318.

(4) 13 W. R. 1015.

(5) 9 H. L. C. 346.

Romer, Q.C., and *P. V. Smith*, for the Defendants:—

The Board have done all they were required to do by the Act of Parliament, and the Education Department has approved of all the Board have done, so far as concerns the taking of the Plaintiff's land.

Public school accommodation does not merely mean that a hard and fast line should be drawn, and that land taken from an individual is to be kept for ever in the same state, and only schools and playgrounds made on it.

Sites have to be altered, and special provisions as to this and as to the exchange of lands are inserted in the Act of 1870.

Suppose the purchase had been completed, could the Plaintiff then have come to this Court and complained that we (with the consent of the Education Department) proposed to exchange part of the land purchased from him for land belonging to an adjoining owner?

We submit that we are acting strictly within our powers.

They referred to *Errington* v. *Metropolitan District Railway Company* (1).

Macnaghten, in reply.

CHITTY, J.:—

The question on this motion is whether the School Board for *London* is taking, or has taken, the plot of land in question *bonâ fide* for the purpose of providing sufficient public school accommodation for the district in question. It is settled that where powers of taking land compulsorily are conferred for certain purposes the promoters of the undertaking who seek to put in force these powers can only do so for the purposes for which they are authorized to take the land, and that they cannot lawfully take the land for what are generally termed collateral purposes foreign to their undertaking; the principle applies to a railway company, and also applies to a municipal body who have power to take lands compulsorily for the purpose of improvements; but as a railway company is chiefly seeking profit in the transaction, whereas in the case of a municipal body profit is not their object, in construing the Act of Parliament, a greater liberality has been shewn towards a public body, such as a municipal corporation or the like, than is shewn to a railway company, which is looked upon more as a body of persons speculating for their own benefit. In the case before me no question arises as to the proceedings of the School Board down to the obtaining of the provisional order. They pursued the course that is described by the 20th section of the *Elementary Education Act*, 1870. They advertised in the months of October and November describing the object for which the land was proposed to be taken, naming a place where the plans might be seen, and stating the quantity of land they required. They also served notice on the Plaintiff as well as on another owner shewing the particular land intended to be taken, and then they proceeded to petition the Education Department, stating in the petition the land intended to be taken and the purpose for which it was required. The Education Department inquired into the propriety of the proposed order, and by the provisional order, which recites in substance what I have stated, the Department having received a report after the inquiry, and having considered the same, declare that it is proper, and thereby order accordingly, that the Board be authorized to put in force, with reference to the pieces of land and rights over land set forth in the schedule, the powers under the said Acts for the purchase and taking of lands otherwise than by agreement, or any of them, and there is to that provisional order a short schedule describing the piece of land which is proposed to be taken from Mr. *Rolls*. The School Board therefore, honestly desired to take this piece of land for the purpose of providing sufficient public school accommodation, and they satisfied the Education Department that the land was required for this purpose.

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(1) 19 Ch. D. 559.

But before the Act of Parliament was passed confirming the provisional order Mr. *Bird*, who is a neighbouring landowner, owning what may be termed with sufficient accuracy "back land," made a proposal to Mr. *Young*, who acts as the agent of the surveyor of the Board in these matters, the effect of which was this, that if the land was acquired by the School Board they should give to Mr. *Bird* a strip of the land leading up from a public roadway which would give him access to that roadway from his back land. The road which was thus to be constructed on the land given was to be made a public road, and a road which would benefit the school-house and the school playground which would be established there, and Mr. *Bird* proposed to give a portion of his back land larger in extent than the area of the proposed road. This was Mr. *Bird's* own proposal. The surveyor, according to his evidence, reported to the Board, and the Board, as he says, have adopted Mr. *Bird's* proposal subject to the consent of the Education Department.

Upon this evidence it is contended on behalf of the Plaintiff, and I think as the evidence stands rightly contended, that the Board adopted the proposal before the notice to treat was served, and I shall dispose of the case on that assumption. It appears to be the right inference to draw from the evidence.

Now there is no agreement binding the Board to carry this proposal of Mr. *Bird* into effect; but it is clear, I think, that the Board will be able to obtain the consent of the Education Department to the scheme of Mr. *Bird.* I turn to the 22nd section of the *Elementary Education Act*, 1870, which enacts that "the provisions of the *Charitable Trusts Acts*, 1853 to 1869, which relate to the sale, leasing, and exchange of lands belonging to any charity, shall extend to the sale, leasing, and exchange of the whole or any part of any land or school-house belonging to a School Board, which may not be required by such Board, with this modification, that the Education Department shall for the purposes of this section be deemed to be substituted in those Acts for the Charity Commissioners." I have no doubt when (if ever) this matter is brought before the Education Department that department will not hear Mr. *Rolls* on the subject, because all that the Department has to consider is, having regard to the section in the *Charitable Trusts Act*, whether the scheme will be beneficial to the School Board, and I have no doubt Mr. *Rolls*, the landowner, is not entitled to be heard.

Under these circumstances can it be fairly said that the School Board are acquiring or have acquired the land in question for the purpose of providing sufficient public school accommodation for the district. Taking all the circumstances together I think that question must be answered in favour of the Board. The Board is not like a railway company that has surplus land and is not only empowered to sell without the consent of any other body, but is bound to dispose of the surplus land. The Board only takes land which is actually required for the purpose of providing public school accommodation for the district, and, as I have said, down to the time of obtaining the provisional order not one word can be suggested against the Board that they were not proceeding *bonâ fide*. Then the Board are not bound at the present moment in point of law to give effect to Mr. *Bird's* proposed scheme, and the Board have no power to dispose of this land, which is inalienable land, except with the sanction of the Education Department, and the land which they propose to give Mr. *Bird* in exchange will be utilized for a purpose beneficial to the school. The surveyor in his affidavit states "Such modification of site will be highly advantageous, as dispensing with the necessity of four entrances to the new school, one for boys and one for girls and infants on the east and west sides thereof. It is intended now that there shall be only two entrances, one for boys and the other for girls and infants, on the new road on the north side thereof. The modification of site will also give to the children better playgrounds, and is in all respects better adapted for the intended schools."

It is plain therefore that the land which has been given to Mr. *Bird* in exchange will not be applied for purposes foreign to the school, but will be used in such a manner as will be beneficial to the school itself.

It seems to me that, putting all these circumstances together, the Board is justified in what it has done. Assuming that the Board had no such proposal before them as Mr. *Bird* made at the time when they served the notice to treat, the question would be free from all doubt, and then they would have been entitled, under the 22nd section of their Act, having acquired the land, to get the consent of the Education Department, if they could, to the proposed scheme. I see no valid reason why the School Board should not, with the sanction of the Education Department, sell any portion of the land which they are thus obtaining on the terms of the land being made by the purchaser into a private or public road where the school will derive an advantage from such an arrangement. The case is not made worse against the School Board because the Board are to receive some other land—some back land—in exchange.

No doubt the result is incidentally disadvantageous to the Plaintiff, because he will lose the advantage which he has hitherto had of making a profitable bargain with Mr. *Bird* as the owner of the back land. The Plaintiff has for some time past been in negotiation with Mr. *Bird* upon this subject, and it is undoubted that he would have been able to command a large price from Mr. *Bird* on the sale of a sufficient portion of land to make a road, but these negotiations were altogether unknown to the Board, and there is no pretence for saying that they have been using, or that they will, when this scheme is adopted, as I have very little doubt it will be, by the Education Department, use their powers with a view to deprive the Plaintiff—I mean purposely use their powers—of the advantage he had. It seems to me this is an incidental disadvantage to the Plaintiff. It is in point of law *damnum absque injuria.* The result is, that I refuse the motion and make the costs costs in the action.

Solicitors: *Markby, Wilde, & Burra; Gedge & Co.*

G. M.

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1884
Aug. 8, 11.

In re LLOYD AND SONS' TRADE-MARK.
LLOYD *v.* BOTTOMLEY.

[1884 L. 1519.]

Trade-Mark—Rectification of Register—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 76, 90, 113.

The right to the exclusive use of a trade-mark, after the expiration of five years from the date of registration, given by the *Trade-Marks Act*, 1883, sect. 76, is subject to and controlled by sect. 90, and therefore any person who considers himself aggrieved by any entry made in the register without sufficient cause is not precluded by the expiration of five years from the date of such registration from shewing that the mark ought not to have been registered.

MOTION on behalf of *Bottomley & Co.*, cigar manufacturers at *Halifax*, in *Yorkshire*, that the entry of a trade-mark registered

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in the name of *Edmund Lloyd & Sons* and used by them on boxes of cigars might be expunged from the register on the ground that it had been entered therein without sufficient cause, being a mark calculated to deceive, and being at the time of registration and continuing to be, a common mark and *publici juris*.

On the 16th of August, 1876, Messrs. *Lloyd & Sons*, who carried on business as cigar and tobacco manufacturers in *Holborn* and at *Exeter*, applied for registration of a trade-mark, consisting of the words "La Minerva-Habana," in respect of tobacco; a user of eight years before the 9th of August, 1876, being claimed for such mark, and on the 24th of May, 1877, the name of *Edmund Lloyd* was entered on the Register of Trade-marks as proprietor of the trade-mark.

Messrs. *Lloyd* having found out in April, 1884, that *Bottomley & Co.* of *Halifax* were selling cigars in boxes made by *Rayner & Co.* of *Liverpool* and branded "La Minerva-Habana," in exact imitation of *Lloyd's* registered trade-mark, issued a writ in June last against *Bottomley* and *Rayner & Co.* for damages for the wrongful use or imitation of the trade-mark, and for an injunction. An interim injunction was obtained, which was afterwards, on the 10th of July, 1884, dissolved upon an undertaking by *Bottomley* to keep an account of all sales of cigar boxes bearing an imitation of the Plaintiffs' trade-mark until after the trial of the action; and *Rayner & Co.* were dismissed from the action upon terms.

Messrs. *Bottomley* had since served notice of motion, and now moved to expunge the trade-mark in question from the register. The application was supported by evidence that the brand "La Minerva-Habana" had been in common and continuous use in the cigar trade for many years prior to 876 and 1877 and subsequently thereto. In particular, large quantities of cigars in boxes bearing this brand had been in 1869, and continuously since, sold both in and out of this country by *Stein & Co.* of *Antwerp*, and boxes thus branded had also been largely manufactured by one *Rothschild* of *Leicester*, whose stock-in-trade, including the brand "La Minerva-Habana," was delivered to *Rayner & Co.* on the 16th of March, 1877, in part payment of a debt due to them.

On the other hand Messrs. *Lloyd & Sons* stated their belief that the trade-mark in question had never been generally used in the trade as applied to cigars, and that their right to it was exclusive. It appeared also that in December, 1877, January 1878, and April, 1879, three separate firms, on threat of legal proceedings, had consented to give up the use of a facsimile of *Lloyd & Sons'* registered mark.

Romer, Q.C., and *Wallace*, for the motion:—

The term "Minerva" as applied to cigars is shewn by the evidence to have been in common and constant use in the trade long before the registration by *Lloyd & Sons* in 1877, and it is not such "a distinctive device, mark, brand, heading, label, ticket or fancy word, or words not in common use" within sect. 64 (1) (*c.*) of the *Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 Vict. c. 57), as to be the proper subject of a trade-mark and capable of registration. We are therefore entitled under sect. 90 to have the entry expunged, as having been made without sufficient cause.

Aston, Q.C., and *E. Cutler* (*Pocock* with them), for the Respondents, Messrs. *Lloyd & Sons*:—

There is nothing in the evidence to induce the Court to believe that the thing registered was not a good trade-mark capable of registration. We deny that the words "La Minerva" were common to the trade or in general use at the time of registration. But even if these words had been words in common use in the trade, we have gained a legal title to this mark after it has been five years on the register without opposition. "If they had gone on for five years they would have got a legal right if they had not been opposed," per *Jessel*, M.R., in *In re Hyde & Co.'s Trade-mark*, 18th of January 1878 (1). In no case as yet has a multifarious user prior to registration of a trade-mark been held to nullify the registration after the lapse of five years, unless in cases where it was something not capable of being registered as a proper trade-mark: *In re J. B. Palmer's Application* (2); *In re Leonard & Ellis's Trade-mark* (the *Valvoline Case*) (3). Although it may have been "publicly used by more than three persons on the same or a similar description of goods," so that it is to be deemed common to the trade in such goods: *Trade-Marks, &c., Act*, 1883, sect. 74 (3), that defect is cured by sect. 76, if, as here, the words registered are special and distinctive within the definitions of the Act (s. 74 (1) (*a.*)) of what is capable of being registered as a trade-mark.

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(1) From Shorthand Notes, S. C. 7 Ch. D. 724.

(2) 21 Ch. D. 47.

(3) 26 Ch. D. 288.

[CHITTY, J.:—As I read it sect. 90 is paramount to sect. 76, having regard to the concluding words of that section "subject to the provisions of this Act."]

We also contend that as our right to this trade-mark had indefeasibly accrued before the commencement of the Act of 1883, we are by virtue of the saving clause (sect. 113) entirely within the protection of the former Act of 1875.

Romer, in reply:—

If, as we contend, these words were not the proper subject of a trade-mark when registered, and ought never to have been registered at all, registration for five years will not cure the defect: *In re J. B. Palmer's Application* (1).

CHITTY, J.:—

Really this is a very plain case when understood. The facts are that *Lloyd & Sons* have been on the register for more than five years in respect of the mark "La Minerva," and they claim to be entitled accordingly.

But evidence is adduced to shew that this so-called trade-mark is not a trade-mark at all, having been a term in common use at the time of registration, and the present motion is to rectify the register under sect. 90 on the ground that the mark was entered "without sufficient cause." Without going through other parts of the Act it is sufficient to say that sect. 76, which enacts that registration shall after the expiration of five years from the date of the registration be conclusive evidence of the right to the exclusive use of the mark by the concluding words, "subject to the provisions of this Act," lets in and is controlled by sect. 90,

(1) 21 Ch. D. 47.

which is paramount to sect. 76, and contains no limitation of time. Any person, therefore, who is aggrieved and can shew that the entry was made on the register without sufficient cause may apply. The language of sect. 76 is not the same as that of the corresponding sect. 3 in the former Act. [His Lordship referred to these sections.]

Apart therefore from *In re J. B. Palmer's Application* (1) the result of this Act is that any person aggrieved may apply to get rid of the entry, and succeed notwithstanding more than five years have elapsed since registration. On the evidence it is plain that this so-called mark was common in the trade, inasmuch as it was in use by more than three persons before the application to register, and, if so, it was not a distinctive mark or device, but was common in the trade, inasmuch as it had been publicly used by more than three persons on the same or a similar description of goods before the application to register. If so, goods having this mark on them had no distinctive mark such as was required by sect. 74. In *In re Hyde & Co.'s Trade-mark* (2), the late Master of the Rolls on motion ordered the registration which had been made to be struck out. Reliance however has been placed in the argument on behalf of the Respondents on an observation of the Master of the Rolls, which was to be found in the shorthand notes of the argument in that case. But the Master of the Rolls reconsidered the matter afterwards in *In re J. B. Palmer's Application*, and at best it was a mere *dictum*. I hold, therefore, that it is competent to the applicants, notwithstanding the expiration of five years from the date of registration, to shew that the thing called a trade-mark is not a trade-mark at all, and ought not to have been registered. The evidence was practically all one way, and there has been an absolute refusal on the part of the Respondent to accept the challenge of the applicant. He nowhere pledges his belief that at the date of registration it was a mark to which he had the exclusive right. No evidence was given of how he came to invent it: in fact, upon the evidence as it stands, it appears that he found the term "La Minerva" current in the market, laid hold of it and got it registered. On the evidence more than four

(1) 21 Ch. D. 47.

(2) 7 Ch. D. 724.

persons had been in the habit of publicly using this mark, and the motion must therefore succeed. I am told, however, that the case depends not on the Act of 1883, but on that of 1875, and that as the Respondent had acquired an absolute title under the Act of 1875, all his rights are preserved to him by sect. 113 of the Act of 1883. It appears to me, however, after the decision in *In re J. B. Palmer's Application* (1) that I must have come to just the same conclusion if I had to decide the case on the Act of 1875. Under sect. 10 of the Act of 1875, which was much more cumbersome, this was not any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of the Act within the meaning of that section, so as to be capable of registration as such under the Act (1875). I therefore come to the same conclusion on both Acts, and the the motion to expunge this mark from the register must succeed.

Solicitors: *Burn & Berridge*, for *Godfrey Rhodes, Halifax*; *W. G. Brighten.*

F. G. A. W.

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(1) 21 Ch. D. 47.

NORTH, J.

1884

May 21, 22, 23.

JAMES *v.* YOUNG.

[1881 J. 465.]

Forest of Dean—Forfeiture of Gale—Election—Time of Application—Empty Gale.

According to the Acts and rules regulating the working of mines in the *Forest of Dean*, a gale or lease is not forfeited by not being worked, unless and until the Crown claims the forfeiture.

The Crown is under no obligation to claim the forfeiture.

An application for a gale will not be valid, unless the gale is at the time empty.

A gale is forfeited and becomes empty when notice that the Crown claims the forfeiture has been given to the galee, and an officer has been ordered to take possession, though possession is not immediately taken. The free miner who applies first after that notice has been given is entitled to the gale.

THE Plaintiffs in this action, *R. James* and *J. Stephens*, claimed as against the Defendants, *J. Young* and *J. Griffiths*, two gales or leases of mines in the *Forest of Dean*.

Certain persons called free miners had by custom been entitled to such gales under the Crown. Their rights were defined and regulated by the Acts 1 & 2 Vict. c. 43, and the Act 24 & 25 Vict. c. 40, the important sections of which are sects. 1, 29, and 56. Under sect. 60 of the first Act, the Commissioners made an award, rules 4 and 9 of which provided for forfeiture of a gale if the mine was not *bonâ fide* opened and worked for five years, and also that persons holding a mine should not desist from working it for five years. An amending Act, 34 & 35 Vict. c. 85, gave the Commissioners power to declare the meaning of rule 4, which they did to the effect stated in the judgment.

By an award made on the 8th of March, 1841, the Commissioners had determined that *J.* and *R. Morrell* were entitled to gales for 1000 years of two coal mines or pits called the *Union* pit and the *Rising Sun engine* pit.

On the 5th of December, 1846, the Plaintiffs applied for a gale which would have included the *Rising Sun engine* pit, and on the 10th of September, 1847, for a gale of the *Union* pit,

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considering apparently that neither pit had been worked within five years from March, 1841, and that the gales were consequently forfeited. This application was entered in the books of the gaveller. It was at that time the practice to enter in the books of the gaveller all applications for gales, whether the gales were full or empty. This practice was afterwards altered, and only applications for empty gales were entered.

On the 17th of September, 1877, after previous notice of his intention, the gaveller signed notices to the trustees of *J.* and *R. Morrell*, declaring the gales of the *Rising Sun engine* pit and the *Union* pit forfeited; and on the same day he signed authorities to deputy gavellers to take possession of the pits, and possession was accordingly taken on the 28th of September, 1877.

On the 21st and 24th of September, the Defendant *Young* and one *Grindell* had duly applied for gales of these two pits. The gaveller refused to enter the applications, and they presented a petition of right praying a declaration that the forfeitures were complete when they made their applications. Vice-Chancellor *Bacon*, on the 8th of December, 1880, made a declaration accordingly (as reported *Ex parte Young and Grindell* (1)), and that their applications ought to have been entered. On the 18th of March, 1881, the gales were granted to *Young*, who afterwards sold them to *Griffiths*.

On the 28th of September, 1877, after the actual re-entry, the Plaintiff *Stephens* had applied for gales of the two pits.

The Plaintiffs on the 21st of March, 1881, brought this action claiming the gales by virtue of the applications in 1846 and 1847; or in the alternative a declaration that the gales were not forfeited till the 28th of September, 1877, and a grant of the gales by virtue of *Stephens's* last application on the 28th of September.

J. G. Wood, and *Vernon Smith*, for the Plaintiffs, cited *In re Brain* (2); *James* v. *The Queen* (3).

W. W. Karslake, Q.C., *W. Barber*, Q.C., and *Renshaw*, for the

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(1) 50 L. J. (Ch.) 221.

(2) Law Rep. 18 Eq. 389.

(3) Law Rep. 17 Eq. 502; 5 Ch. D. 153.

Defendants, cited *Doe* v. *Bancks* (1); *Roberts* v. *Davey* (2); *Rede* v. *Farr* (3); *Clough* v. *London and North Western Railway Company* (4).

J. G. Wood, in reply, *Morgan* v. *Crawshay* (5).

The arguments are fully noticed in the judgment of the Court.

North, J., stated the facts, and read the principal clauses in the Acts, and rules, and award; and said that it was clear that on the 8th of March, 1846, when the five years from the time of the award expired, the *Union* gale had never been worked at all. As to the *Rising Sun* gale the onus of proof was on the Plaintiffs, and they had not proved that the gale had not been worked before 1846. It had been worked in 1847, and the Court could not infer that it had not been worked before 1846. The working had, however, been discontinued since 1855.

His Lordship then proceeded:—

The first point taken by Mr. *Wood* for the Plaintiffs was, that in 1846 and 1847, when the Plaintiffs' applications were made, the gales were already forfeited; that they were empty gales, and that there was no reason why that application, which was admittedly the earliest, should not have full effect given to it. The first question therefore is what was the effect of omission to work for five years from the date of the award? This question applies, beyond doubt, to the *Union* pit, and would have applied to the *Rising Sun engine* pit if I had not decided as to that gale as I have decided. Now the 29th section of the Act (1 & 2 Vict. c. 43) provides for the making of an award, and it then provides that, "After the award has been made all the gales and other works shall be opened and worked according to the true intent of the rules and regulations so made; and in case any person or persons entitled to or in the possession of any gale now granted, or hereafter to be granted, shall wilfully proceed in opening or working any such gale contrary to such rules and regulations after seven days' notice from the gaveller to discontinue doing so, then the said gales shall be liable to be forfeited as and for a breach of condition." Then it goes on to provide that the same—that is the gales—"shall always after the award be considered as held on condition of performing and abiding by the rules and regulations in all respects, and the person or persons in possession of any such gales may be evicted therefrom by Her Majesty, her heirs or successors, as might be done on the forfeiture of a lease for breach of condition; and all such gales so forfeited shall be subject to be again galed or leased as other the mines, minerals, or quarries, in the said forest and hundred; and in addition to such right or power of eviction, the compliance with such rules, orders, and regulations may be enforced by and on behalf of Her Majesty, her heirs or successors, or by any other person or persons, by injunction of Her Majesty's Court of Exchequer, or otherwise in such manner as the said Court shall on application think fit." It is said that under that section as soon as there is any default in working under the rules, or any non-compliance with the rules, there is an absolute forfeiture which cannot be got rid of, so that at the end of the five years the gales came to an end without the exercise of any discretion by the gaveller, or any other person. But in the first place if the Legislature had intended that, I think it would have said so. Nothing would have been easier than to have said "it shall be forfeited and come to an end." I say nothing about the construction of those words if they had been there; but when the words are not "shall be forfeited," but "shall be liable to be forfeited," it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced. Then the first amended rule recognises precisely the same thing when it says, "The true meaning of rule 4 . . . . is that all persons . . . . who shall not *bonâ fide* commence opening the same within the space of five years," shall be, not "evicted," but "liable to be evicted." Therefore clearly again it points to the liability that a person comes under of being evicted, and not to the absolute loss of the gale without anything further being done. Besides, it is not only that it shall be liable to be forfeited, but there are other words, "may be evicted." Now, I do not think those words throw much light upon it, because "may be evicted" are words which I think might be used even if the forfeiture had been clear and absolute. It would not follow that the eviction should be compulsory. The gaveller might do as he pleased about that. But then the further words at the end seem to me to be very important, because they seem to provide in addition to the right of eviction that there shall be something else. It says that "the compliance with the rules and regulations may be enforced by injunction or otherwise." It is quite true that an injunction might be granted in case of a threatened breach of covenant, and such things are not unfamiliar, but in ninety-nine cases out of a hundred, when an injunction has been granted it is where a breach has taken place, and I think that the rule clearly contemplates the granting of an injunction to enforce the regulations where a breach has taken place. Now, if a breach has taken place, according to the argument of the Plaintiffs, this lease would be entirely at an end without the option of anybody to continue it, and if so I do not see how there could possibly be any injunction to restrain any further breach of it, when by the mere fact of the breach having taken place, the interest of the galee had entirely come to an end. It seems to me that from beginning to end that section contemplates liability to forfeiture, but not forfeiture unless the party having the right to forfeit expresses a wish to that effect.

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(1) 4 B. & Ald. 401.

(2) 4 B. & Ad. 664.

(3) 6 M. & S. 121.

(4) Law Rep. 7 Ex. 26.

(5) Law Rep. 5 H. L. 304.

Then there is this further, that this section and the award both recognise the analogy between the state of things existing where a man has a gale under a license, and the condition of a lessee under a lease. The two things are treated as being very similar. He is to be evicted "as might be done on the forfeiture of a lease for breach of condition." Now in a lease it is quite clear that where the provision is expressed that on a breach of condition the lease shall be void to all intents and purposes whatever, that does not mean void in the sense in which a person, not a lawyer, might understand it; but it means this, "shall be void if the person who is entitled to take the benefit of the provision chooses to say that it shall be so." But then it is said this rule does not apply here, notwithstanding the reference by analogy to a lease, because there the whole matter rests with the lessor and lessee, and no third person is interested in it, whereas here a person who applies for a gale of the same property—a third party therefore—has an interest in it, as he would have a right to the grant of a gale if the other interest was out of the way, and that it is impossible to say that the gaveller is to have an option whether the forfeiture is to be enforced or not. As regards that, it seems to me that the person who exercises the right to say whether forfeiture has taken place or not, is the person who has the right to grant the gale to any other galee if application is made for it, and that it is left to the Crown or to the representatives of the Crown to say whether the forfeiture shall be enforced or not, and when it shall be enforced, and I do not think that the applicant for a gale has any interest in that question.

But further it is said that it is impossible to contend that the gaveller can have a right of suspending the forfeiture for such time as he pleases, because there are express provisions in the Act and the Rules that in two particular cases he may extend the time, and therefore in all other cases he cannot extend the time. Now I do not accept that argument, and for this reason. It might be that at the end of five years the right to forfeiture had accrued, yet that the galee had not money to go on with, but saw his way to getting money for the purpose if he could get an extended term; and it might well be that a further term would be granted to him if the persons representing the Crown thought it was a proper case. And if so it is clear that they could not take any further step until the expiration of that term. The right to remain in possession for a given time is quite a different thing from remaining in possession permissively from day to day simply because the person who has power to evict has not chosen to put his power in force. Therefore it seems to me that the forfeiture depends on whether the Crown or its representative chooses to enforce it, and that the gale continues, notwithstanding non-working, until that option has been exercised. It might well be in the present case that it was not exercised, because it was considered better for the miner to remain liable to pay the dead rent.

The next point raised for the Plaintiffs is that even if there was no forfeiture, and the gale was full, and the *Morrells* were the galees, still the applications made in 1846 and 1847 were good applications, and must have effect given to them whenever subsequently to that time, if ever, the gales became vacant. Now that raises a question which I am told has never been actually decided, whether the application to be made must be made at the time when a gale is vacant or not. Sect. 60 points to the way in which applications are to be made, and provides "that the gaveller or deputy gaveller for the time being shall grant gales to free miners in the order of their applications in writing to be made from and after the passing of this Act; and the entry of such applications in the books of the gaveller or deputy gaveller shall be evidence of the priority of such applications respectively." On this it is said that the applications in 1846 and 1847, being admittedly prior in point of date to any other application, must have effect given to them as soon as by the expiration of the existing interest a new grant can be made. It appears to me, in the first place, that that construction would be extremely inconvenient. It would lead to this, that you might have an application made as a matter of course by every free miner, as soon as he attained twenty-one, for every gale in the whole forest, and the inconvenience of having such a number of claims would be very great. It is quite true that he could not get a grant of more than three gales, and as soon as he got three there would be an end of it. But still until such grants were made there would be all these applications for every gale, and the inconvenience would be extreme. It is said that sect. 60 does not say in terms that the application shall be made only when the gale is empty, but I think that such is the effect of the words, and I think that the 56th section rather points to the same conclusion. I do not say that it settles the question, but it seems to me to point very strongly in that direction. There is first a proviso as to the rules to be observed in granting gales, and towards the end of the section there is a second proviso: "Provided, nevertheless, that no gale shall hereafter be granted until fourteen days' notice at the least of the application for the same, specifying the situation and particulars thereof, shall have been published by the said gaveller or deputy gaveller for the time being in some one or more newspaper or newspapers pub-

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lished and circulated in the said county of *Gloucester*, and in which notice the day and hour on which, and the place at which, it is intended to grant the said gale shall be specified." Of course it is possible that under these applications made in 1846 and 1847 an advertisement might be issued when the gale became vacant in 1877; I say that is possible, but reading the section I cannot help feeling strongly that the Legislature in passing it was contemplating the case of, not the postponement for an indefinite time, but the provision that an application shall not be followed by a grant until fourteen days have elapsed, that is to say, it contemplates that an application and a grant would come very near together, and so postpones the time for the grant, in order that notice may be given to other persons, to a time beyond the time at which I think the Legislature thought the grant would probably have been made but for that postponement. Further than that, the practice in the office has been for many years to enter only those applications which are made when the gale is empty, it previously having been the practice to enter all applications; and though the practice in the office does not bind this Court in any way, yet it shews that it has been felt what serious inconvenience might arise if the other construction was adopted.

But I do not think that that is all I have to guide me, because there seems to have been, I will not say a judicial decision, but an express opinion against the Plaintiffs' contention on the subject. Vice-Chancellor *Malins*, on the demurrer in the case of *James* v. *The Queen* (1), says: "Then, being a free miner, he has the rights which he had in point of fact before the passing of this Act, which are confirmed to him by the Act; and amongst the rights is that of applying for a gale, and, as I read the Act of Parliament, the gaveller or deputy gaveller (the gaveller is the person who exercises the function, and the deputy acts for him) has no discretion whatever, but upon an application being made by a free miner for a gale which is free from any other application, the first applicant is to have the gale. What the gaveller has to do is to consider—Is the applicant a free miner? Does he apply for a gale which is unoccupied?" Now that is very

(1) Law Rep. 17 Eq. 509.

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clear. It is clearly the opinion of the Judge that the application must be for a gale which is unoccupied, and that it was not the gaveller's duty to consider any application for a gale which was made at a time when that gale was already in the possession of somebody else, and I find remarks to the same effect by the same Judge upon the hearing (1). There, as he points out, "*Beddis's* grant came to an end by his forfeiture in 1868, and it would be very inconvenient to treat the application of *Adams* and *Jordan*," that is a previous application, "as one subsisting after that grant, which in fact was, under 24 & 25 Vict. c. 40, a grant of the fee simple of the gale, leaving nothing in the Crown but a right of re-entry for forfeiture." That case shews that all that the Crown has got when the gale is full is, the right to receive the rent and royalty, and also a right of re-entry in case of forfeiture. It seems to me that it would be very strange if the construction were that the application should be treated as made to persons who had no such rights but these. For instance, supposing an application were now made to the Crown in respect of property which the Crown might get hereafter by escheat, it is very unlikely indeed that any such application would come to anything, and an application for a gale when it is full seems to me really very much in the same position.

Then there is another point. If Mr. *Wood's* argument is correct the decision of *Bacon*, V.C., in *Ex parte Young and Grindell* (2) was entirely misconceived. There the gale had been forfeited by non-user, and the forfeiture was held complete on service of the notice of forfeiture without actual re-entry on the part of the Crown. *Young* and *Grindell* claimed to have it declared that the forfeiture was complete before the 21st and 24th of September, when their applications were made. Now if the application could be entertained at all times, there was no possible ground for arguing the question when the forfeiture was declared. It would be utterly immaterial when the forfeiture was declared, because if the forfeiture had been on the 28th only, and the applications had been on the 23rd or 24th, still if the applications might have been properly made when the gale was full they ought to have been entered, and there would have been no

(1) 5 Ch. D. 153, 155.

(2) 50 L. J. (Ch.) 221.

occasion for deciding this point. But not only did no one make the suggestion, but the Vice-Chancellor proceeded to deal with the case on the footing that it was necessary for him to decide at what time the forfeiture had taken place, because (and this is the view he took) if the forfeiture had not taken place before the applications were made, the applications could not be entertained. The common case of all parties on that occasion was exactly opposite to the present contention of Mr. *Wood.* It seems to me, therefore, that inasmuch as the applications made in 1846 and 1847 were made long before there had been any election to forfeit, those applications were not good applications.

The next point raised by Mr. *Wood* is that if the first applications were of no use, then the second application on the 28th of September, 1877, is good, because though the first were premature the Defendant's applications on the 21st and 24th of September were premature also, and if that were so the application on the 28th of September was the first made when the gale was empty, and that is the one which ought to have effect given to it. Now for that purpose it is necessary to consider whether on the 21st and 24th of September, when the Defendant's applications were made, the applications were good or not. It seems to me clear that at that time there had been a forfeiture, and with respect to that in the first place I refer to, without using them in detail, the cases mentioned by Mr. *Karslake.* The only one I intend to mention, on account of some observations of *Littledale,* J., is the case of *Roberts* v. *Davey* (1). The case was this: There was trespass for breaking and entering the lands of the plaintiff: Plea, that the defendant had license to dig and mine for ore: Replication, that the supposed license was granted subject to a condition that if the grantee should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from thenceforth the indenture and the liberties and license thereby granted should cease, determine, and be utterly void and of none effect. The question was what that meant. *Littledale,* J., says (2): "The replication cannot be supported; it seems to me that, according to *Doe* v. *Bancks* (3), this instrument was liable to be rendered void only at the election of the grantor. If it had been a freehold lease of land, subject to a condition that it should be void on non-performance of covenants, it would have been necessary for the lessor to avoid it by entry; or, if that were impossible, by claim. This instrument is a mere license to dig, and did not pass the land. An actual entry, therefore, was unnecessary to avoid it; but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the non-performance of covenants, it seems to follow that, to put an end to this license, the grantor should have given notice of his intention so to do. The giving of such notice in the case of an instrument like this is equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed." The opinions of the other Judges, *Denman*, C.J., and *Parke*, J., were to the same effect.

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(1) 4 B. & Ad. 664.

(2) 4 B. & Ad. 671.

(3) 4 B. & Ald. 401.

I need not refer to other cases on that point, except to the very clear statement given in the Court of Exchequer Chamber in 1871, in the case of *Clough* v. *London and North Western Railway Company* (1), where the judgment was delivered by Mr. Justice *Mellor*, but prepared by Lord *Blackburn*, as stated by himself in *Scarf* v. *Jardine* (2). At page 34 there is this very clear statement of the law, perhaps the clearest that can be found anywhere. What was being dealt with there was the question when a contract obtained by fraud could be got rid of, and what act would get rid of it, and the judgment is this: "And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And, as is stated in *Com.* Dig. Election (3), if a man once determines his election it shall be determined for ever; and, as is also stated in *Com.* Dig. Election (4), the determination of a man's election shall be made by express words or by act. And, consequently we agree with what seems to be the opinion of all the Judges below, that if it can be shewn that the *London Pianoforte Company* have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture: *Jones* v. *Carter* (1). We cannot do better than to cite the language of *Bramwell*, B., in *Croft* v. *Lumley* (2), which precisely expresses what we mean. He says, 'The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not avoid the lease, and he may do so by deed or by word; if, with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of *Anne*), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, and does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election?' In all this we agree, and think that, *mutatis mutandis*, it is applicable to the election to avoid a contract for fraud. In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

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(1) Law Rep. 7 Ex. 26.

(2) 7 App. Cas. 345, 360.

(3) C. 2.

(4) C. 1.

(1) 15 M. & W. 718.

(2) 6 H. L. C. 705.

Now, that being the law, what here took place was this. In May, 1877, a formal notice was given that if the galee did not work there would be a forfeiture. Of course if that was all it would not amount to anything. But it was followed by a notice of forfeiture, and by an order for the deputy gaveller to take possession. These were deliberate acts of determination, being a statement that an election had been made,—not a mere threat,—and a direction which was acted upon as soon as the deputy gaveller was able to act upon it, although this did not happen to be for about ten days. This was at once communicated to *Morrell's* trustees, and it appears to me that as soon as it was communicated to them there was an end of the matter, because this was an act which could not have been revoked in any way. *Morrell's* trustees would have had a right to say, "You elected to determine, and communicated that to us, and we at this time are perfectly free." And in the same way, as they were bound by it, and had the benefit of it, the other parties giving the notice were also bound by it, and they had the benefit of it. Then I find that this very point was decided by Vice-Chancellor *Bacon*, because, although Mr. *Wood* put it to me that all he decided was that there was a notice, at any rate, as early as the 17th, I find in the note at the end of the report that the order made is this (1): "Order the applications on the 21st and 24th of September to be entered in that order, the forfeiture being declared to be on the 17th." Therefore there was an express decision by the Vice-Chancellor that the forfeiture did take place at that time. Now Mr. *Wood* says that his client was not a party on that occasion, and that is perfectly true. It is not, therefore, a decision against him in the sense of being *res judicata*, but as against him it is a case so precisely in point, so undistinguishable from the present, that, there being no decision of any sort to the contrary, I should not hesitate for a moment to follow the decision of the Vice-Chancellor on that point, even if my view were more doubtful than it is. But independently of that, I quite agree in the view that he took. What took place is, however, not really important, because the re-entry on the 28th is entirely immaterial, as re-entry in the case of the Crown is not necessary. If, therefore,

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(1) 50 L. J. (Ch.) 223.

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in the case of a subject it would have been necessary—and here I do not think it would, because it appears to me that the giving the notice was all that need be done under the circumstances—but even supposing it were necessary in the case of any party other than the Crown, it was not necessary in the case of the Crown. In my opinion, therefore, the gales were not full at the time when the applications of the Defendants were made. That being so, those applications were good, and prior to the subsequent applications of the Plaintiffs, and the Defendants, therefore, are entitled under their applications.

Under these circumstances the Plaintiffs' case fails, and the action is dismissed with costs.

Solicitors for Plaintiffs: *Peacock & Goddard,* agents for *J. Hullett, Coleford.*

Solicitors for Defendants: *Starling & Giblett,* agents for *W. Roberts, Jun., Coleford.*

C. M.

MAYOR OF NEW WINDSOR *v.* STOVELL.

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[1877 N. 97.]

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 48—*Local Board—Drainage—Binding Successors—Trustees—Improvident Bargain—Ultrà vires—Change of Circumstances.*

Under the *Public Health Act,* 1848, s. 48, the owner of land adjoining a district by deed agreed with the local board to do certain works and pay £10 a year, and the board gave him leave to drain through their drain all sewage from the property and houses then belonging to the landowner and from any houses thereafter to be erected on the property. Many more houses were afterwards erected and the urban sanitary authority (which had succeeded the local board) were under a new Act of Parliament prevented from passing as before the sewage through the drain into the *Thames*:—

Held, that the deed was not *ultrà vires,* and that the board could bind their successors as to the sewage of houses not then in existence.

Held, that though the board were trustees for the ratepayers they had exercised their discretion, and the agreement did not appear at the time improvident, and its turning out badly for them did not affect it.

Held, that the law being altered so as to prevent the discharge of sewage into the *Thames* was no ground for setting aside the deed.

THE Defendants in this case were the trustees and the owners of the *Clewer* estate, consisting of about 300 acres, of which about 140 acres were available for building purposes, eighteen acres being within the borough of *New Windsor*. In the year 1857 Mr. *Arthur Vansittart* was the owner of the estate, on which about fifty houses had then been built, and other parts had been advertised to be let for building.

The Plaintiffs were the urban sanitary authority for the district of the borough of *New Windsor* and represented the former local board of health for the borough of *New Windsor*, in whom the sewers of that district were in 1857 vested under the *Public Health Act*, 1848 (11 & 12 Vict. c. 63). The 48th section of that Act enabled any owner of premises adjoining any district to cause any sewer or drain from such premises to communicate with any sewer of the local board upon such terms as should be agreed upon, or in case of dispute, as should be settled by arbitration. And by the interpretation clause the word "premises" included messuages, buildings, lands, and hereditaments of any tenure.

Early in 1857 Mr. *A. Vansittart* applied to the local board as to the drainage of his estate into their main sewer. Correspondence took place and resolutions were passed by the board, a committee of which viewed the place. Ultimately an indenture was made between Mr. *Vansittart* and the local board, by which Mr. *Vansittart* agreed to construct (amongst other works) a brick barrel drain of 287 yards (part of which was in the borough and used by the local board) communicating with the sewer of the local board, and to pay £10 a year to the local board; and the local board for themselves, their successors and assigns, did "give and grant unto the said *A. Vansittart*, his heirs and assigns, full and free leave, license, and permission for him and them to drain and carry off and permit to flow into and through the said barrel drain . . . . all the drainage and sewage from the said property and houses now belonging to him the said *A. Vansittart* at *Clewer* aforesaid, and any houses hereafter to be erected on the said property." Mr. *Vansittart* constructed the barrel drain and other works and had duly paid the £10 a year. Many more houses had been built on the *Clewer* estate since 1857, and the sewage of the whole was discharged into the sewer of the local board and thence into the *Thames*.

Under the provisions of an Act passed in 1866 the Conservators of the *Thames* had taken proceedings against the Plaintiffs requiring them to discontinue the flow of sewage into the *Thames*, and the Plaintiffs had been compelled to give an undertaking to build a new sewer. The Plaintiffs alleged, as appeared to be the fact, that according to the powers of the Conservators they would be compelled to erect pumping apparatus, and that the cost which would be necessary to enable the Plaintiffs to dispose of the drainage of the *Clewer* estate would be very great, and that they would be compelled to make large additional provisions for disposing of that drainage.

The Plaintiffs brought this action against the present owners of the *Clewer* estate, alleging that the deed of 1857 had been made only on the basis of the then existing arrangements for the flow of sewage into the *Thames*; that the deed was unreasonable and *ultrà vires* of the local board and was not binding on the Plaintiffs, and that the provisions as to future houses were void; and that the indenture was erroneously prepared. And the Plaintiffs prayed a declaration that the deed of 1857 was *ultrà vires* and void; or, if necessary, that it might be rectified and confined to the sewage from houses built before 1857; or that it might be declared to be no longer binding on the Plaintiffs; and for an injunction.

Davey, Q.C., *Everitt*, Q.C., and *C. Healey*, for the Plaintiffs:—

The local board was only empowered as to the sewage of then existing houses, and could not bind its successors as to houses not then built or contemplated. In consequence of the action of the Conservators, a heavy expense of pumping and otherwise will be laid on the ratepayers by this additional sewage. This shews how improbable it is that the Legislature should have intended to give power to the local board to make an agreement which would burden the ratepayers to all time and under any change of circumstances. The surviving members of the local board have made affidavits that the deed was not understood or intended to extend to houses not then built. There seems to be no authority on this 48th section.

[NORTH, J., referred to *Oceanic Steam Navigation Company* v. *Sutherberry* (1).]

In *Clay* v. *Rufford* (2) a lease by directors was set aside. A local board cannot contract to give a future easement, and so fetter their successors. At all events, the deed is inoperative as to the new houses, and must be confined to the old houses. But this deed is clearly a mistake, as the board did not understand what they were doing: *Wood* v. *Saunders* (3); *Harris* v. *Pepperell* (4); *Attorney-General* v. *Acton Local Board* (5).

Sir *F. Herschell*, S.G., *Barber*, Q.C., and *De Castro*, for the principal Defendants:—

Sect. 48 does not leave an absolute discretion to the board, who must submit to arbitration if they refuse to allow the communication. If that had been done, what pretence could there be to set the award aside, and where is the difference? The Act does not limit the powers of the board, and the only limit is as to the size of the sewer. Is it contended that a separate application must be made for each new house? What would the builder and what would the board have to do? There would be no sewer to make. When the sewer is made, the landowner must have a right to use it. It cannot be doubted that the intention of both parties was that the whole estate should be drained into this sewer.

B. B. Rogers, and *W. C. Druce*, for other Defendants.

Davey, in reply:—

If a new house is built the owner must apply, and the board may say that the sewer is not large enough.

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(1) 16 Ch. D. 236.
(2) 5 De G. & Sm. 768.
(3) Law Rep. 10 Ch. 582.
(4) Ibid. 5 Eq. 1.
(5) 22 Ch. D. 221.

Aug. 2. NORTH, J.:—

Three questions are raised in this case. The first which I will deal with is the question whether the deed as it now stands is correct or not, and whether the intention of the parties was really something different, so that the deed must be put in a right shape in order to effectuate what was their intention. [His Lordship then stated the terms of the deed and the evidence as to what took place before the execution of the deed, coming to the conclusion that there was no evidence of a mistake common to both sides, and that there was nothing to shew that it did not carry out the intention of all parties at the time when it was executed.]

The second point raised is that the deed itself was *ultrà vires*, because the board were in effect entering into a bargain which amounted to a settlement of the price to be paid for every future communication with the sewer of the board, and this was outside their powers. That, however, if true, would not enable me to say that the deed was void. As regards the surface drainage, and as regards the existing houses it is clear beyond all question that the settlement was entirely within their powers. The only question, therefore, is whether it can be said that they were going beyond their powers as regarded houses which were not then in existence, but should be erected afterwards. The words of the section are: "Be it enacted that any owner or occupier of premises adjoining or near to but beyond the limits of any district, may cause any sewer or drain of or from such premises to communicate with any sewer of the local board of health upon such terms and conditions as shall be agreed upon between such owner and occupier and such local board, or, in case of dispute, as shall be settled by arbitration in the manner provided by this Act." It is said that this section conferred a discretionary power upon the board as trustees or *quasi* trustees, and that they could not exercise it as to the drainage of property, and could not agree as to communications to be made, or do anything, except with respect to what was actually in existence at the time; and it is said that after that arrangement a fresh bargain must be entered into with respect to every communication to be made after that date from a house not then existing with the sewer of the board either mediately or immediately. As regards that section, it does not seem right to say that it is a case in which the board are acting as trustees in the sense in which it was put. No doubt it is left to them to settle the terms and conditions, and inasmuch as those terms and conditions did not affect them individually, but affected the ratepayers, they were so far acting on behalf of other persons. But the power given them is to make an arrangement as to the terms and conditions of the work, and there is nothing which enables them to say that it shall not be done at all. Under this Act, in case the terms should not be agreed upon they might be settled by arbitration. Under the *Public Health Act*, 1866 (29 & 30 Vict. c. 90, s. 9), for the first time, an additional power is given of having disputes settled by two justices. That clause appears almost verbatim in the *Public Health Act*, 1875, except that instead of two justices a court of summary jurisdiction, which means the same thing, is mentioned.

This was a case in which, in my opinion, the owner of the adjoining property had a right to have the communication made, as was decided by Vice-Chancellor *Malins* in the similar case of *Newington Local Board* v. *Cottingham Local Board* (1). The Vice-Chancellor says (2): "I have paid great attention to the case, which has been ably argued, and I feel bound to come to the conclusion that it is the right of every owner without the district to consider what will be most convenient to him. It cannot, I think, be better illustrated than by the case of the Botanic Garden, which lies immediately contiguous, so that nothing could be more advantageous to them, nothing more obvious to them when building upon their ground, than to do that which it would be their duty to do, and drain into the nearest sewer, and that sewer is the sewer of the *Cottingham* district." I should say that the proprietors of the Botanic Gardens were the owners of about fifty-five acres of land, which they were proceeding to lay out for building ground; so that there was a building estate of considerable size. Then the Vice-Chancellor says: "That is the right which they have proceeded to exercise, and that is the right which, according to my view, is clearly conferred upon them by

(1) 12 Ch. D. 725.

(2) 12 Ch. D. 733.

the 22nd section of the Act of 1875," or in the present case by the Act of 1848. If that is so, there was a right on the part of Mr. *Vansittart* to have the sewer made to communicate with his land, and on what terms? The terms, no doubt, are to be settled, and if the parties cannot agree, the terms are to be settled by arbitration, and when so settled, notwithstanding any objection on the part of the board, they would be binding, and the right to connect with the sewer would arise. As soon as that has been done everything contemplated by the section has been done, and I do not see how after that anything further remains to be done.

It is said that the board would have a difficulty in knowing upon what terms to settle, because they could not know what would be done with the land, how many houses would be built upon it, or what burden might be cast on them. That is one of the difficulties with which they have to contend, and they must deal with it by taking care that the terms which are made limit the number of houses, or require a payment in respect of them which will be a fair remuneration, as Vice-Chancellor *Malins* pointed out in the same case, saying (1): "It appears to me, therefore, that when the *Newington* Board entered into this arrangement with the *Cottingham* Board, they were bound to consider what, under the existing law, was the chance of the drainage being increased by persons other than those who had a strict right to drain into the *Cottingham* sewer. They were bound to enter into a calculation how far the sewage would be increased, and to make their sewer of the size which was calculated, not only to dispose of the actual sewage, but of that sewage which would be added to it, in the exercise of the power which appears then to have existed, and which undoubtedly exists under the subsequent Act of Parliament. Therefore it is an inconvenience which, as it appears to me, they are bound to suffer, and the right is perfectly clear." Therefore Mr. *Vansittart* having a right to make this connection, and to have all the provisions of this section immediately carried out, the board must do the best they can for the purpose of fixing the terms, and must fix them fairly and reasonably. Unless the terms are complied with the connection cannot be made, but as soon as they have been complied with, the

(1) 12 Ch. D. 732.

connection is to be made, and, as it seems to me, there is an end of the matter. Under these circumstances the section is, in my opinion, equivalent to a grant to the owner of the adjoining land of a right to have the connection made and to use the connection when made. There are no express words as to user, but I consider that the direction to make the communication carries with it the right to do what was the only purpose in contemplation when the terms were arranged.

Then it is said that this must in some way be limited to the property in the state in which it was at the time, and that the occupier of lands, buildings, or hereditaments, who has brought the section into play, must have had this right conferred on him simply with respect to the land as it stood at the time, and it was said that the case of *Wood* v. *Saunders* (1) was an authority for that proposition; but I do not think it is so in any way. If the judgment of the Vice-Chancellor *Hall* is looked at as fully set out in the *Weekly Reporter*, instead of the short note of it in 10 Ch. D. 583, it will be seen that what he went on was the express terms of the grant as construed with regard to the circumstances disclosed on the face of the deed. He considered that the grant of a right of sewage was limited to the existing house, because, amongst other reasons, the power to make any substantial change in the house was expressly negatived, as the deed required the house to remain as it was. In the present case I do not see anything which refers to the houses or premises remaining in the state in which they were at the time.

In the case of an easement by usage where you have to measure the extent of the easement, not by the terms of any deed, as the deed is *ex hypothesi* lost, but simply from what has been done, there is no way of ascertaining the extent of the easement except from what has been done. But where the deed of grant is in existence the grant is not to be measured by what has been done under it, as the terms of the grant speak for themselves. In *Williams* v. *James* (2) Mr. Justice *Willes* says: "The distinction between a grant and prescription is obvious. In the case of proving a right by prescription the user of the right is the only

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(1) Law Rep. 10 Ch. 582; 23 W. R. 514.

(2) Ibid. 2 C. P. 577, 581.

NORTH, J.
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MAYOR OF NEW WINDSOR v. STOVELL.

evidence. In the case of a grant the language of the instrument can be referred to, and it is of course for the Court to construe that language; and in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against the grantor must be applied. Accordingly, in *South Metropolitan Cemetery Company* v. *Eden* (1), where a grant was produced without stating the object of the grant, it was the opinion of the Judges that the grant was general, and that the way in that case might be used to any part of the land to which the way was granted." Again, in *United Land Company* v. *Great Eastern Railway Company* (2), the point was this, as stated in the head-note: "A railway company taking land compulsorily, contracted to make communications by level crossings between two severed portions of an estate. The estate then consisted of marsh or mud-land, and was subject to a statutory prohibition against being built upon. The prohibition having been afterwards removed, and the land becoming applicable for building purposes:—*Held*, that a right of way over, under, or across a railway was *primâ facie* general and not restricted to purposes to which the land was applicable at the time the right arose; and the right being unrestricted in terms gave the owners and occupiers of the land the use of the level crossings for all purposes connected with houses or buildings subsequently erected or to be erected on the estate, but not so as to obstruct the proper working of the railway." In *Newcomen* v. *Coulson* (3) the Master of the Rolls put a very clear interpretation upon the word "lands" in that case. It is said that he was there dealing simply with the construction of the *Inclosure Act*, and of the award in that particular case, and so he was; but the observation which he made about the meaning of the word "lands" did not turn on the meaning of the word in that particular case, but on the general meaning of the word just as it is used in the interpretation clause of the Act of 1848, as one of the things to which the word "premises" in the 48th section extends. He pointed out that "land" meant land in its condition for the time being, and it is not the less land in the meaning of the Act or of the award, because houses are afterwards built upon it. That was a case of a right of way to land, and in this case I am dealing with a right to have sewage flowing away from land, and we have nothing to do with the question what houses existed on it at the time when the grant was made.

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(1) 16 C. B. 42.

(2) Law Rep. 17 Eq. 158.

(3) 5 Ch. D. 133.

There is besides the more recent case of *Finch* v. *Great Western Railway Company* (1), in which the whole law was gone into and explained, and *Newcomen* v. *Coulson* (2) was recognised and followed. Those cases satisfy me that the proper construction to be put upon the word "premises," as used in this section, is premises in the state in which they are, not at the time when the Act was passed or when the arrangement was come to, but at all times thereafter and whatever the state they may be in.

Then it is said that it is almost impossible to believe that such can be the true construction of the Act, because the result will be so disastrous to the local board. But in the first place, if the arrangement was within their powers, its turning out badly for them would not affect it; and in the next place, there was, in my opinion, nothing improvident or unreasonable about it. Whether the terms arrived at were good or bad, I have no means of judging, but the local board were in a position to judge what burden the existence of the sewer would, under all the circumstances under which the sewer might be used, cast upon them; and I see no reason to doubt that they considered that £10 a year, with the cost of making the drain of the dimensions specified, partly through the land of the local board, was a fair return for what was acquired by Mr. *Vansittart.* It is quite true that events have since taken place which were not in the contemplation of the parties, and which would make it desirable to throw a larger burden upon the person who owns these houses, but it does not appear to me that that affects the question.

There is one further observation to be made. At the time when the Act was passed other Acts had been passed giving similar powers under similar circumstances; not of course in exactly the same terms, and it may be said that the construction of one Act does not throw much light on the construction of another Act; but one Act I think it not immaterial to refer to,

(1) 5 Ex. D. 254.

(2) 5 Ch. D. 133.

the *Towns Improvement Act*, 10 & 11 Vict. c. 34, the 34th section of which provides for a similar communication being made on payment of a reasonable sum of money. Now the "reasonable sum" must necessarily be a payment once for all, and though the words in that Act are different, they shew that at that time what was contemplated was a provision to be made once for all. [His Lordship then referred to the contention raised by the statement of claim, and at the bar, that the deed ought to be rectified on the ground that it was entered into solely on the basis that the discharge of sewage into the *Thames* would be permitted to continue; and his Lordship referred to the evidence of members of the local board that such was their intention. His Lordship was of opinion that there was no agreement to that effect, though the parties probably thought—if they thought about it at all—that the sewage would continue to flow into the *Thames*.] That it was any part of the agreement between them, or that the alteration by the Legislature of that state of things conferred any right to have the agreement altered, is an argument which I cannot entertain. The operation of the deed was not in any way limited or intended to be limited to the time when the sewage flowed into the *Thames*, and therefore that part of the contention cannot be supported.

Under these circumstances the action must be dismissed with costs.

Solicitors for Plaintiffs: *A. S. Lawson*, agents for *C. T. Phillips, Windsor.*

Solicitors for Defendants: *G. L. P. Eyre & Co.*, agents for *Long & Co., Windsor; Longbourne & Co.; Markby, Wilde, & Burra.*

C. M.

PEARSON, J.
1884
May 28.

In re BLACHFORD.
BLACHFORD *v.* WORSLEY.

[1882 B. 2137.]

Legacy—Interest—Delay in realization of Estate—Statute of Limitations— 37 *&* 38 *Vict. c.* 57, *s.* 10.

The property of a testatrix who died in 1869 consisted mainly of a reversionary interest. This interest was not sold by the executors, and it did not fall into possession until 1881. In the opinion of the Court the executors had acted for the benefit of the estate in not selling the reversion:—

Held, that legatees under the will who had waited for the payment of their legacies until after the falling in of the reversion were entitled, not merely to six years' arrears of interest, but to interest on their legacies from the expiration of one year after the death of the testatrix.

FURTHER CONSIDERATION.

This action was brought for the administration of the estate of *Ellen Margaret Blachford*, who died on the 1st of February, 1869. By her will, dated the 31st of January, 1867, the testatrix gave, devised, and bequeathed to *Thomas Cox* and *Jonathan Worsley* (whom she thereby appointed trustees and executors of her will), their heirs, executors, administrators, and assigns, all her real and personal estate, upon trust for sale and conversion as therein mentioned, and to stand possessed of the proceeds of sale and conversion in trust to pay, and she thereby gave and bequeathed certain legacies, one of which was a legacy of £2000 to her father, *T. J. Blachford*. By a codicil dated the 1st of February, 1869, the testatrix revoked the appointment of *Thomas Cox* as trustee and executor, and appointed her father in his place. The executors both proved the will, and acted as trustees. The estate of the testatrix consisted mainly of a reversionary interest which was not sold by the executors, and did not fall into possession until March, 1881.

On the 18th of December, 1843, a fiat in bankruptcy issued against *T. J. Blachford*, and on the 27th of February, 1844, he was adjudicated a bankrupt. The bankruptcy was never closed, and he did not obtain an order of discharge. On the 17th of

March, 1882, the official assignee in the bankruptcy gave notice to the executors of the testatrix that he claimed the legacy of £2000.

From the year 1858 down to the year 1870 *T. J. Blachford* was intrusted by a Miss *Ryder* with various sums of money to invest on her behalf, and on the 3rd of April, 1882, an account was stated between them, by which it appeared that there was a balance of £2009 11*s.* 5*d.* due from him to her. She requested him to give her security for this balance, and he, on the 3rd of April, 1882, executed a deed by which he assigned the legacy of £2000 to her by way of mortgage to secure the balance of £2009 11*s.* 5*d.* On the 5th of April, 1882, she gave notice of this assignment to the executors.

The action was brought by a residuary legatee.

One question was whether the official assignee in the bankruptcy of *T. J. Blachford* or Miss *Ryder* was entitled to priority in regard to the legacy of £2000.

PEARSON, J., held that as the official assignee had given notice to the executors first he was entitled to priority.

Another question was whether interest was payable on the legacy from one year after the death of the testatrix, or only for six years.

Cozens-Hardy, Q.C., and *Chisholm Batten*, for the Plaintiff:—

The legatee is entitled to only six years' arrears of interest. Under the old *Statute of Limitations* (3 & 4 Will. 4, c. 27), s. 42, it was held that there was an exception from the limitation of six years for the recovery of interest on a legacy in the case of an express trust. But now, by sect. 10 of the *Limitation Act* of 1874 (37 & 38 Vict. c. 57), that exception is abolished.

[PEARSON, J.:—The legatees might have insisted on the reversionary property being sold for the purpose of paying them, but they did not. Ought they not to have interest from the end of one year after the death of the testatrix?]

Barnes, for the executors:—

In *Gough* v. *Bult* (1) interest was allowed on a legacy for

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(1) 16 Sim. 323.

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twenty-five years, and that case was in effect affirmed in *Thomson* v. *Eastwood* (1). The *Limitation Act* of 1874 makes no difference; sect. 10 applies only when the legacy is charged on or payable out of any land or rent, and secured by an express trust. In the present case the legacy is not so charged or payable or secured.

Cookson, Q.C., and *Cordery*, for the official assignee in the bankruptcy of *T. J. Blachford*:—

The bankrupt being also an executor could not sue himself; the *Statute of Limitations* has, therefore, no application. So long as the characters of debtor and creditor are united in the same person the creditor's remedy is suspended, and the *Statute of Limitations* has no effect: *Binns* v. *Nichols* (2). *Earl of Milltown* v. *Trench* (3), *Turner* v. *Buck* (4), shew that interest is payable from a year after the testatrix's death.

Cozens-Hardy, in reply:—

The assignee could sue the executors. The right to interest is regulated entirely by the statute; and it is immaterial whether the estate benefited by the delay in realizing the reversionary interest. Sect. 10 of the Act of 1874 gets rid of the decision in *Gough* v. *Bult* (5).

PEARSON, J. (after stating the provisions of the will), continued:—

The property of the testatrix consisted mainly of a reversionary interest which it was thought best not to sell. It fell into possession in March, 1881. *T. J. Blachford* is entitled to his legacy, with interest, except so far as his right has been interfered with by his bankruptcy or by his assignment. The question is, for what length of time is he entitled to receive interest? Those who claim through him stand in this respect in the same position as he does. He being a trustee of the will, all questions as to the *Statute of Limitations* are out of the way. I must decide the case as between him and the estate. I must take it that the reversionary

(1) 2 App. Cas. 215.
(2) Law Rep. 2 Eq. 256.
(3) 4 Cl. & F. 276, 310.
(4) Law Rep. 18 Eq. 301.
(5) 16 Sim. 323.

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property could not properly, having regard to the interests of all parties, have been sold. There has, therefore, been no laches which can alter the rights of the parties. The value of the reversion when it fell into possession represented the value of the property of the testatrix at her death together with all the increment which had arisen in consequence of the delay. The persons who have waited all this time for their legacies are, I think, entitled to interest from the expiration of one year after the death of the testatrix.

Cozens-Hardy:—Any legatees who have received their legacies without interest are barred by acquiescence.

PEARSON, J.:—I think not, unless they have done some act to release the estate.

Solicitors: *H. M. Yetts*; *Woodrooffe, Burgess, & Loch*; *Gedge, Kirby, & Co.*

W. L. C.

CLAPHAM *v.* ANDREWS.

[1884 C. 132]

PEARSON, J.
1884
June 21.

Mortgagor and Mortgagee—Mortgages of two Estates—Foreclosure Action—Redemption—Apportionment of Costs of Action—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), s. 17.

An action was brought by a mortgagee for the foreclosure of two mortgages of two distinct estates, executed by the same mortgagor to secure two different advances. Both mortgages were executed since the *Conveyancing Act*, 1881, came into operation:—

Held, that the whole of the costs of the action ought to be included in the account relating to each estate, and that the mortgagor could not redeem either estate separately without paying the whole of the costs of the action.

THIS was a foreclosure action. The Plaintiff held two mortgages, dated respectively the 5th of June, 1882, and the 16th of February, 1883, by which the Defendant mortgaged to him two different estates to secure two distinct sums advanced by the

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Plaintiff to the Defendant. The action was brought for the foreclosure of both mortgages. The mortgagor did not appear to the writ.

Stallard, for the Plaintiff:—

As the mortgages were both executed since the *Conveyancing Act*, 1881, came into operation, they cannot be consolidated. The question arises how the costs of the action should be apportioned between the two mortgages. The proposed minutes provide that a moiety of the costs shall be charged against each estate.

PEARSON, J.:—

I think the proper course is to make the whole of the costs chargeable against each estate. If the mortgagor wishes to redeem either estate separately, he ought to pay the whole of the costs of the action.

The minutes, as altered in accordance with this direction, provided that, as to each mortgage, an account should be taken of what was due to the Plaintiff under the mortgage deed for principal and interest, and the costs of the action, and that the Defendant should be entitled to redeem each mortgage on payment of what should be found due in respect of it. The order as afterwards drawn up by the Registrar contained an express declaration that the Defendant was to pay the costs of the action once only.

Solicitors for Plaintiff: *Clapham & Fitch.*

W. L. C.

In re PRICE'S PATENT CANDLE COMPANY.

PEARSON, J.

1884

July 4.

Trade-mark—Distinctive Letters—Name of Firm—Fancy Words not in Common Use—Identical Label—Power of Comptroller—Sanction of Court—Refusal to register.

An application was made for an order upon the Comptroller of Trade-marks to register a mark having the words "*Price's Patent Candle Company*" in common letters round the upper border and "National Sperm" in the centre, with the address of the company round the lower border. The Comptroller refused to register the mark, on the ground that there was a mark so nearly resembling this, already on the register, as to be calculated to deceive, and also because it was not a distinctive label within the terms of the *Patents Act*, 1883:—

Held, that the name of the firm printed in common letters not being distinctive, and the words "National Sperm" not being fancy words "not in common use," the label did not fulfil the requirements of the *Patents, Designs, and Trade-marks Act*, 1883, s. 64:

Held, also, that the Comptroller would be justified in refusing to register a label so nearly resembling another label already on the register as to be calculated to deceive, until the opinion of the Court should have been obtained authorizing him to do so.

THIS was an application on behalf of *Price's Patent Candle Company* for an order upon the Comptroller of Trade-marks to register the applicants as proprietors of a trade-mark in Class 47.

The facts were these: On the 1st of January, 1881, *Herbert Masson*, trading as *J. Pepler & Co.*, registered a trade-mark, No. 25,446, to be used on candles. That mark consisted of an oval label shewing two oval black lines on a green ground. Between the outer and inner oval were the trading name and address of the applicant. Within the central oval were the words "National Sperm" in black capital letters. This mark contained none of the essential particulars of a trade-mark set out in sect. 64 of the *Patents, Designs, and Trade-marks Act*, 1883, but it was claimed as having been in use since 1873, and was therefore accepted by the Trade-mark Registry under the provision of the 10th section of the *Trade-marks Registration Act*, 1875, which allowed the registration of any distinctive word or words used as a trade-mark before the passing of that Act. According to the view of the Commissioners of Patents the mark consisted

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only of the words "National Sperm" incidentally identified by the addition of the applicant's name and address.

On the 9th of February, 1884, *Price's Patent Candle Company* applied to register the mark No. 35,858, which consisted of an oblong label with an engraver's border in blue, containing the name of the company printed in ornamental type, white upon blue within the lines of the border, and the address of the company in ordinary type white upon blue in the lower lines of the border. The centre of the label consisted of a white tablet with scalloped edge, shewing the words "National Sperm" in red capital letters, and this mark, like that of *Pepler & Co.*, was to be used on candles. The applicants alleged that they had used this mark for several years, but not before the passing of the *Trade-marks Act*, 1875. The tablet and the border, being of the ordinary conventional kind, would not have been considered sufficient to constitute the mark "a distinctive label" within sect. 10 of the *Trade-marks Act* of 1875, but in the interval between the registration of *Pepler & Co.'s* mark and the present application the *Patents Act*, 1883, had been passed, and that Act by sect. 64 extended the definition of essential particulars by including "a fancy word or words not in common use." Under this section the Comptroller would have accepted the application had it not been for the existence of *Pepler & Co.'s* registration for the same goods, but he considered that sect. 72 of the Act of 1883 prohibited his proceeding with the claim, as in his opinion the applicants' mark so nearly resembled *Pepler & Co.'s* trade-mark, already on the register, as to be calculated to deceive.

The applicants contended that their mark did not so nearly resemble that of *Pepler* as to be calculated to deceive, and that even if it did resemble *Pepler's* mark the case of *Mouson* v. *Boehm* (1) was an authority for admitting the second mark upon the register, notwithstanding sect. 72.

Aston, Q.C., in support of the application:—

The label now proposed to be registered by *Price's Patent Candle Company* is of a totally different character from that of *Pepler*, exce ptthat it has the words "National Sperm" in the

(1) 26 Ch. D. 398.

centre. That definition as applied to candles is practically known as of our manufacture, but it happens that *Pepler & Co.*, who are dealers in candles, and not manufacturers, have those words on the register as a label of theirs. Our label, however, is "*Price's* National Sperm," and theirs is "*Pepler's* National Sperm," which makes the distinction complete. We say that we are aggrieved because we had acquired the right in 1877 to use this mark, which was before the other was registered. That registration was not till May, 1881, and no objection has ever been made by *Pepler & Co.* to our use of this mark. The 75th section of the Act states that registration of a trade-mark shall be deemed equivalent to public use of the mark, but it does not give any exclusive right against persons who previously to such registration had already acquired a right to use a trade-mark. That was decided by Mr. Justice *Chitty* in *Mouson* v. *Boehm* (1).

We say our label, as "*Price's* National Sperm," is a distinctive label, and would be entitled to protection independently of the Act, for nothing is more distinctive than a man's name. We have had from 1877 downwards a user of that label in connection with our goods. Suppose we had "*Price's Patent Candle Company, Limited, Belmont Works, Battersea*," that would be a perfectly good label. Instead of that we have "National Sperm" added to *Price's Patent Candle Company, Limited, Belmont Works, Battersea.* We say, then, that the two together form a distinctive mark.

Stirling, for the Comptroller of Trade-marks:—

There are two questions in this case: one is whether the applicants can have their label registered, having regard to the label already registered by *Pepler*; and the other is whether, independently of that, this is such a label as ought to be registered as a trade-mark. The old practice under sect. 6 of the Act of 1875, which was almost identical with sect. 72 of the last Act, was to give notice to any other person on the register, when a similar label was proposed to be registered, and the same course ought now to be pursued. There is no evidence before the Court that

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(1) 26 Ch. D. 398.

Pepler & Co. have ever heard of this application, or that they would not object to the registration of the applicants' mark if they heard of it.

As to the second question—which is of great importance with regard to the duty of the Comptroller—it must be observed that *Pepler's* mark was registered as an old mark, in use prior to the 13th of August, 1875, at which time the line is drawn. Words brought into use after that date could not be registered at all under the old Act. That has been altered by the new Act. The 64th section shews plainly that the Legislature did not contemplate that a trade-mark should be registered simply because it bore on it the name of a firm or an individual, unless that name was printed, impressed, or woven in some distinctive manner. By sub-sect. 1 (c.) the limitation which is put upon words in a trade-mark is this: It must consist of a fancy word or words not in common use; and by sub-sect. 3 it is provided that distinctive words used as a trade-mark before the 13th of August, 1875, may be registered. It was under that clause that *Pepler's* label was registered. There is nothing in the form of the label which would have entitled him to register, apart from those words "National Sperm." There is nothing in the applicants' title of a distinctive nature which would entitle them to registration. There is nothing in the colour, because when registered, any colour may be used, and there is nothing in the outline which is in any way distinctive. Nor does the addition of "*Price's Patent Candle Company*" make any difference, because it is not printed, impressed, or woven in a particular or distinctive manner.

But the real essence of the applicants' claim and what they look upon as a trade-mark is the title "National Sperm," and there is no ground for saying that those words come under sect. 64. If they are fancy words they are in common use, and therefore not within the section. [He also cited *In re Leonard & Ellis's Trade-mark* (1).]

There is another question arising under sect. 72, upon which the Comptroller would be very glad to have the direction of the Court. His impression is that, there being other trade-marks of a similar character on the register, it is necessary to refer the matter to the Court which has jurisdiction to hear and determine the appeal.

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(1) 26 Ch. D. 288.

Aston, in reply.

PEARSON J.:—

I simply have to construe the Act which is before me. I cannot agree with what Mr. *Aston* says, that you can deal between two rival firms in this Court without reference to the Act at all. If a man has been selling soap for a great number of years which has become known as *Pears*' soap, this Court would have jurisdiction, and would probably exercise that jurisdiction, to restrain another person from selling another soap as *Pears*', without any reference to the Act; but the question before me is this: whether or not a trade-mark can be registered—whether a device or design, or anything you might propose to call it, can be registered under this Act,—except in strict conformity with the regulations laid down here. The Act says this: for the purpose of this Act a trade-mark must consist of, or contain at least one of the following essential particulars; that is to say, for the purposes of the Act the owner of it may be registered under the Act, not at all with reference to the case as to whether or not a man may so use a mark which his neighbour has been using as to defraud the public, and defraud his neighbour, but with reference to a register of trade-marks—first "a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner." It is admitted that in this particular label the name of *Price's Patent Candle Company* is neither printed, impressed, nor woven in any distinctive manner. Then, omitting sub-sect. 1 (b.), which it is unnecessary to read, sub-sect. 1 (c.) says there must be a "distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Now, unless I can hold that this is a distinctive label or ticket—which I am not prepared to hold in this case—then undoubtedly the words "National Sperm," which are the words in the largest type here, are not "fancy words not in common use"; because the words "National

Sperm" are *ex concessis* in common use, and perfectly well known in the trade. The consequence is this, that I have a mark which does not contain either of the particulars which are essential to a trade-mark under this Act, because it does not contain the name of the company printed in a distinctive manner, and it does not contain any fancy word or words which are not in common use. Mr. *Aston* says at all events this is a distinctive label, or distinctive ticket. I very much doubt whether this is a distinctive label or ticket; and certainly, unless I had something very strong to shew that it was so distinctive from other labels purely from the colours in which it is printed, and from the design of it, I am not prepared to hold that this is what is intended under this Act to be a distinctive label or device. I do not say those words are not hard to construe, because I think they are. I should conceive that in a label of this kind the name of the firm being printed in common letters would not be a distinctive label. The intention seems to me, not that it is to be a design in this shape, but a design practically to constitute a trade-mark apart from the words "*Price's Patent Candle Company,*" and so forth, and "National Sperm." I do not think Mr. *Aston* would contend that really and truly this label was what was being registered. It is not the label alone. You might have the label alone as a trade-mark if it was a distinctive trade-mark absolutely unlike all other labels; but what the Comptroller is here asked to register is not the label, but the label with all manner of words on it, which do not conform to the regulations under the Act. Then the 72nd section is no doubt very important:—"Except where the Court has decided that two or more persons are entitled to be registered as proprietors of the same trade-mark, the Comptroller shall not register in respect of the same goods or description of goods a trade-mark identical with one already on the register with respect to such goods or description of goods;" and, speaking as at present advised, in answer to Mr. *Stirling*, I am of opinion that the Comptroller would be perfectly justified in saying, and it would be the course which he ought to adopt, "Inasmuch as there is already a trade-mark on the register either the same as, or nearly identical with the one you are proposing to register, I cannot register yours until you have got the opinion of the Court authorizing me so to do."

Under these circumstances I cannot direct this mark to be registered.

Aston, Q.C.:—We do not admit that the words "National Sperm" are in common use.

Pearson, J.:—I took a great deal of pains to ascertain whether they were or not, and I certainly thought they were. If I went to order "National Sperm" candles everybody would know what I wanted. *Pepler & Co.* sell them as well as you, and, for aught I know, there may be hundreds who do. All I can say, however, is, that I am not satisfied that they are fancy words. The application will be refused with costs.

Solicitors: *Wilson, Bristows, & Carpmael; Solicitor to the Board of Trade.*

T. W. G.

PEARSON, J.
1884
July 28, 29.

In re DOVE.
BOUSFIELD *v.* DOVE.

[1883 D. 898.]

Bankrupt—Certificate of Conformity—Effect of Suspending Order—Bankruptcy Act, 1842 (5 *&* 6 *Vict. c.* 122), *ss.* 37, 39—*Bankrupt Law Consolidation Act*, 1849 (12 *&* 13 *Vict. c.* 106), *s.* 199—*Practice—Chief Clerk's Certificate—Application to vary—Rules of Supreme Court*, 1883, *Order* LV., *rr.* 70, 71.

In July, 1848, an order was made that the grant of a certificate of conformity to a bankrupt be suspended for three years.

During the period of suspension, the *Bankruptcy Act* of 1849 came into operation; which provided (s. 199) that "every certificate of conformity, allowed by any Commissioner before the time appointed for the commencement of this Act, though not confirmed according to the laws in force before that time, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat":—

Held, that, as, by virtue of that section, confirmation of the order of July, 1848, was no longer required, that order became, at the expiration of the period of suspension, of itself a complete discharge to the bankrupt, and that property acquired by him after the expiration of that period belonged to him and not to the assignee in the bankruptcy.

On an application upon the further consideration of an action for an extension of the time, under rule 71 of Order LV., for applying to vary a finding in a Chief Clerk's certificate:

Held, that the applicant should take out a summons for the purpose.

FURTHER CONSIDERATION.

On the 21st of March, 1848, *James Dove* was adjudicated a bankrupt in the *Newcastle-upon-Tyne* District Court of Bankruptcy.

On the 11th of July, 1848, an order was made by the Commissioner suspending the grant of a certificate of conformity to the bankrupt for the period of three years from the 30th of June, 1848, and adjourning the sitting of the Court until the 30th of June, 1851.

The material part of the order, as drawn up, was as follows:—

"The said Commissioner, having regard to the said bankrupt's conduct as a trader, and to the nature of the debts contracted by him since 1842, and to the circumstances under which the same were contracted by the said bankrupt, who acted in a fiduciary character or relation to several of the persons to whom such debts are due, and especially to Mr. *Thomas Laidman Hodgson*, did adjudge that the grant of such certificate of conformity be suspended for the period of three years from the said 30th day of June now last, and did order that the said sitting be, and the same is, hereby adjourned to the 30th day of June which will be in the year 1851."

No other order granting a certificate to the bankrupt was ever made, and no order of confirmation was ever obtained.

On the 31st of October, 1856, *Jane Ridley Dove*, a daughter of the bankrupt, died a spinster and intestate, leaving her father her sole next of kin. At the time of her death she was absolutely entitled, under the will of her grandfather, to one-sixth part of the residue of his estate, subject to the life interest of her mother (*Mary Dove*) therein.

In September, 1862, the bankrupt died.

In May, 1872, letters of administration of his personal estate were granted to *Thomas Lowther Dove*, the Defendant.

In February, 1882, *Mary Dove* died, and thereupon *Jane R. Dove's* reversionary interest (amounting to about £600) fell into possession.

In April, 1883, this action was brought by *John Bousfield*, the creditors' assignee of the bankrupt, against *Thomas Lowther Dove*, who was also the administrator of *Jane Ridley Dove*, for the administration of her personal estate.

On the 6th of July, 1883, an administration judgment was pronounced, which directed, *inter alia*, an inquiry whether *James Dove* "ever obtained any certificate of conformity under his bankruptcy, or in any and what manner became entitled for his own use to property acquired by him after the date of his bankruptcy."

In answer to this inquiry the Chief Clerk, by his certificate filed the 26th of March, 1884, found that *James Dove* "did not ever obtain a certificate of conformity under the bankruptcy, or in any manner become entitled for his own use to property acquired by him after the date of his bankruptcy."

The action now came on for further consideration, and one of the questions which arose was whether, under the circumstances, the bankrupt had become entitled, on the death of his daughter in 1856, to her vested reversionary interest, or whether it belonged to his creditors' assignee (1).

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(1) By sect. 37 of the *Bankruptcy Act*, 1842: "Every bankrupt, who shall have duly surrendered, and in all things conformed himself to the laws in force at the time of issuing the fiat in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as hereinafter mentioned; and no certificate of such conformity by any such bankrupt shall release or discharge such bankrupt from such debts, claims, or demands, unless such certificate shall be obtained, allowed and confirmed according to such provisions."

By sect. 39: "It shall be lawful for the Court authorized to act in the prosecution of any fiat in bankruptcy already issued or hereafter to be issued, on the application of the bankrupt named in such fiat, to appoint a public sitting for the allowance of such certificate to the bankrupt named in such fiat (whereof and of the purport whereof twenty-one days' notice shall be given in the *London Gazette* and to the solicitor of the assignees); and at such sitting any of the creditors of such bankrupt may be heard against the allowance of such certificate; . . . and such Court, having regard to the

In October, 1849, the *Bankrupt Law Consolidation Act* of 1849 came into operation (1).

The Defendant had not taken out any summons to vary the Chief Clerk's certificate (2).

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conformity of the bankrupt to the laws relating to bankrupts, and to the conduct of the bankrupt as a trader before as well as after his bankruptcy, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require; Provided always, that no certificate shall be such discharge, unless such Court shall, in writing under hand and seal, certify to the Court of Review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fullness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be confirmed by the Court of Review, against which confirmation any of the creditors of the bankrupt may be heard before such Court."

(1) By sect. 199 of the Act of 1849: "The certificate of conformity under this Act shall be in writing under the seal of the Court, and the hand of the Commissioner, and shall certify that the bankrupt has made a full discovery of his estate and effects, and in all things conformed; and that, so far as the Court can judge, there does not appear any reason to question the truth or fullness of such discovery (and shall be in the form contained in the schedule Z. to this Act annexed, or to the like effect); and notice of the allowance of such certificate, and of the class thereof, shall be advertised in the *London Gazette*, in such manner as may be directed by any rule or order to be made in pursuance of this Act; and every certificate of conformity allowed by any Commissioner before the time appointed for the commencement of this Act, though not confirmed according to the laws in force before that time, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat."

(2) By rule 70 of Order LV. of the Rules of the Supreme Court, 1883: "Every certificate, with the accounts (if any) to be filed therewith, shall be transmitted by the Chief Clerk to the Central Office to be there filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied upon application by summons to be made before the expiration of eight clear days after the filing of the certificate; provided that the time for applying to discharge or vary certificates, to be acted upon by the Paymaster General without further order, or certificates on passing receivers' accounts, shall be two clear days after the filing thereof."

Rule 71: "The Judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties."

On the 6th of May, 1884, the Defendant's solicitors served a notice in writing upon the Plaintiff's solicitor, that, on the hearing of the action on further consideration, the Defendant would submit to the Court that, "under the order made on the 11th of July, 1848, and in the events which have happened, *James Dove* must be taken to have obtained his certificate of conformity before the death of *Jane Ridley Dove*."

Cookson, Q.C., and *Maidlow*, for the Defendant, asked that the time might be enlarged, under rule 71 of Order LV., for applying to vary the Chief Clerk's finding that the bankrupt did not ever obtain a certificate of conformity.

They read an affidavit by one of the Defendant's solicitors to shew special circumstances.

Higgins, Q.C., and *Swinfen Eady*, for the Plaintiff:—

We do not oppose the application, but a summons ought to be taken out *pro formâ*.

Cookson:—

Rule 71 says that the application may be made "by motion or summons." If a summons is taken out, a fee will be payable, but there is no fee on a motion.

PEARSON, J.:—

I think there has been a slip, and that the time ought to be extended. But I think the Defendant should take out a summons. His solicitor must undertake to pay the fee, and the point can be argued now.

Cookson, Q.C., and *Maidlow*, for the Defendant, as legal personal representative of the bankrupt:—

By the order of July, 1848, the Court "did adjudge that the grant of such certificate of conformity be suspended" for three years. That was an adjudication that the certificate be "granted," or "allowed," with a suspension of three years: *Re Neale* (1); *Re Laforest* (2); and the allowance became complete when the

(1) 1 Fonbl. Cases in Bankruptcy, 206.

(2) 2 N. R. 159, 251.

period of suspension expired: *In re Everard* (1); as, at that time, the confirmation of the certificate, required by the Act of 1842, had been done away with (2).

[They also referred to *Ex parte Eyre* (3); and rules 60 and 63, under the Act of 1849.]

Higgins, Q.C., and *Swinfen Eady*, for the Plaintiff:—

The order of July, 1848, was not intended to be a final order; its effect is simply that there is to be no certificate of conformity for three years. There has, therefore, never been any "allowance" of the certificate under the Act of 1842. The bankrupt has never obtained a certificate, either under the Act of 1842, or under the Act of 1849; and the finding of the Chief Clerk is correct.

In re Everard is distinguishable. There the Commissioner had awarded a certificate, with a period of suspension; here the sitting was adjourned, *i.e.*, the consideration of the allowance of the certificate was postponed.

[They also referred to *Re Tidmarsh* (4); *Ex parte Curtis* (5); and sects. 198, 199, 203, 256 of the *Bankruptcy Act* of 1849.]

Pearson, J. (after stating the facts, and referring to sects. 37 and 39 of the Act of 1842), continued:—

I take it that, under the words of sect. 39, a bankrupt applying for his certificate would have to apply for it at a public sitting; and that at that public sitting the Commissioner would attend to any objection made by the creditors of the bankrupt, and decide, in the terms of the Act, whether the certificate should be allowed, or refused, or suspended, or have certain conditions annexed to it. If he granted it, it would, subject to the proviso at the end of the section, take effect from the date on which the order was made. If he refused it, there would be no question at all arising upon it, except the right of the bankrupt to appeal from that refusal. If he suspended it, I conclude that the order suspending it would be a grant of the certificate, subject to that suspension. The section goes on to say that "no certificate shall be such discharge, unless such Court shall, in writing, under hand and seal, certify to the Court of Review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fullness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be confirmed by the Court of Review, against which confirmation any of the creditors of the bankrupt may be heard before such Court." Now all those matters are, to my mind, matters that have to be done in order that the bankrupt may get full protection from his debts. If he wants that, he must get the Court to certify as therein mentioned; he must make the oath therein required; and he must get the confirmation from the Court of Review. If this case stood simply upon the Act of 1842, the result would be that there would have been no discharge of the bankrupt, because it is admitted upon both sides that he made no such oath, and that the Court of Review did not confirm the certificate. But, the order having been made on the 11th of July, 1848, and the period of suspension not expiring until the 30th of June, 1851, between those two dates the Act of 1849 was passed. That Act, among other things, provided (sect. 203), by way of safeguard, that, if any creditor was dissatisfied with the certificate of conformity granted by the Court to the bankrupt, he might, within six months, apply to the Vice-Chancellor (who was then the Court of Review, so to speak), and ask that the certificate might be recalled. But the Act of 1849, while repealing the Act of 1842, kept it alive for the purpose of supporting any proceeding in bankruptcy which had been already taken under that Act. The 1st section of the Act of 1849 repeals all the previous Bankruptcy Acts with certain exceptions, and "except also so far as may be necessary for the purpose of supporting any proceedings taken or to be taken under and after the commencement of this Act, upon any trading, act of bankruptcy, petitioning creditor's debt, fiat, or other proceeding in bankruptcy before the commencement of this Act." Then, the Court of Review having been abolished, sect. 199 of the Act contains this clause: "and every certificate of conformity allowed by any Commissioner, before the time appointed for the commencement of this Act, though not confirmed according to the laws in force before that time, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat." Now the effect of that clause to my mind is this—that the order made on the 11th of July, 1848, though not confirmed by the Court of review, confirmation having become unnecessary, was sufficient to protect the bankrupt from all debts provable under his bankruptcy. It is said, however, that no certificate of conformity has been granted. Now, the order of the 11th of July, which I must take to have been in accordance with the practice of the Court in the year 1848, is in these terms:—[His Lordship read the order.] It is said that that order does not operate as a discharge to the bankrupt, because it ends with the words, "And the same" (that is the sitting) "is hereby adjourned to the 30th of June, 1851." I do not so read it, having regard to the 199th section of the Act of 1849. It might have been quite right, and I doubt not it was right, to adjourn the sitting until the 30th of June, 1851, because under the Act of 1842, the certificate of conformity was not complete as a discharge to the bankrupt from his debts, until further steps had been taken. But I cannot for one moment suppose that, even under the Act of 1842, after this order had been made, it would have been competent for the Commissioner to sit and try again the question of the suspension of the certificate. I do not understand that the Commissioner could, if applied to on the 30th of June, 1851, have suspended the certificate for any subsequent period of years. I think that the order of the 11th of July, 1848, was a final order as regards the Commissioner; and that the only thing left for him to do, at the adjourned sitting of the Court, was to certify, or to refuse to certify, as he pleased. But the Legislature, by the Act of 1849, swept away the whole of the proviso contained in sect. 39 of the Act of 1842, and declared that a certificate of conformity, granted under the Act of 1842, should discharge the bankrupt from all his debts without confirmation. The consequence, to my mind, is, that, on the 30th of June, 1851, the bankrupt in the present case had obtained a certificate of conformity which was a complete discharge from all his debts. In my opinion the case of *In re Everard* (1) fully bears out this construction of the Act. That was a case under the Act of 1849. The bankrupt's certificate had been suspended for six months; and, the Act saying (sect. 257) that, when the certificate was suspended, the Court would, on the application of the assignees, grant another certificate which would enable them to take proceedings against the bankrupt, as under a judgment, for payment of his debts, that case decided that, at the moment when the six months expired, without any more being done, the bankrupt became discharged. In that case the assignees had taken proceedings under the second certificate; they had issued process against the bankrupt during the six months, but they had taken him in execution after the six months had expired; and Baron *Alderson* in the course of his judgment said (2): "Then the 257th section further provides, that, as soon as allowance of the certificate of conformity has taken place, that is, when the period, if any, of suspension has expired, the certificate thus given shall be deemed to be cancelled and discharged. It is, as my Brother *Parke* has observed, similar to a judgment defeated by an *auditâ querelâ*, the result of which is, that everything founded on the judgment must fall with it."

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(1) 6 Ex. 111.

(2) Bankruptcy Act, 1849, s. 199.

(3) 2 D. M. & G. 946.

(4) 1 Fonbl. Cases in Bankruptcy, 156.

(5) Shelford on Bankruptcy, 3rd Ed. 594.

I think that that case throws a great deal of light upon the construction of the 199th section of the Act of 1849, and confirms the view which I take, namely, that, as confirmation was no longer required with regard to orders made under the Act of 1842, that section meant to place (and I must construe it as placing) such orders exactly in the same position as a similar order made under the Act of 1849. In that case the Court of Exchequer said, that, the moment the period of suspension expired, without anything further, the order became absolute. In the same way here, the order was made, and there was no confirmation of it, no confirmation

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(1) 6 Ex. 111.

(2) 6 Ex. 117.

PEARSON, J. 1884 In re DOVE. BOUSFIELD v. DOVE.

being required under the Act of 1849; I think, therefore, that, when the period of suspension expired, the order became absolute. I therefore decide that, in the year 1856, when the bankrupt's daughter died, he, as representing her, became entitled to this reversionary interest, and that it did not vest in his assignee.

A summons must be taken out *pro formâ* to vary the certificate.

Solicitor for Plaintiff: *R. T. Jarvis.*
Solicitors for Defendant: *Church, Rendell, & Trehane.*

W. L. C.

Followed. Re LATTA'S SETTLEMENT. [1949] 1 All E.R. 665.

PEARSON, J. 1884 *July* 28, 31.

In re SWINBURNE. SWINBURNE *v.* PITT.

[1881 S. 1763.]

Power—Exercise—Special Power of Appointment—Appointment to Persons not Objects of Power—Direction to pay Debts of Appointor—Election.

A testatrix had, under the will of a brother who had predeceased her, a power to appoint his property by will among his nephews and nieces and the children or child of deceased nephews and nieces. She, by her will, gave all the real and personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power of disposition, to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds (which she described as "my said trust funds") upon trust to pay costs and expenses, and to pay her debts and funeral expenses and certain pecuniary legacies, and then upon trust as to two one-fourth parts of her trust funds respectively for persons who were objects of the power; and upon trust as to the other two one-fourth parts respectively for persons who were not objects of the power. And she declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trusts should fail, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail:—

Held, that the testatrix had manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised:

Held, also, that, as to the other moiety of the brother's property, the appointment was invalid, but that, by virtue of the gift "in case of the failure of any of the trusts thereinbefore declared," that moiety went to the persons to whom the first moiety was well appointed, and that, consequently, no case of election arose.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate, and the execution of the trusts of the will, of *Helen Swinburne*, who died on the 27th of February, 1881.

Edward Swinburne (a brother of the testatrix), by his will, dated the 6th of July, 1867, appointed his sisters *Helen Swinburne* (the testatrix) and *Felicia Swinburne* executrixes of his will, and to his said sisters he gave all the real and personal property and effects which he might die seised of or entitled to, In trust to receive, take, and enjoy the same, and the rents and income arising therefrom, for their own joint uses during their joint lives, and after the death of either of them, then for the life of the survivor, for her own sole and separate use, and after the death of such survivor he directed that the whole of his property should be divided between his nephews and nieces, and the children or child of his nephews or nieces who might be then dead, in such shares and proportions as his said surviving sister should by her will direct or appoint, and in default of her making any such direction, then he directed that his entire property should go to and be equally divided between his nephews and nieces and the children or child of any deceased nephew or niece, such children or child taking their, his, or her deceased parents' or parent's shares or share *per stirpes* and not *per capita*. The testator died on the 24th of January, 1879. *Felicia Swinburne* died on the 24th of September, 1879.

Helen Swinburne, by her will, dated the 18th of December, 1879, after appointing *William Pitt* and *James Finch* executors of her will and trustees for the purposes thereinafter expressed, devised, appointed, and bequeathed all the real and personal estate of which she might be seised or possessed at the time of her decease, or over which she might have any testamentary power of disposition, unto her said trustees, their heirs, executors, administrators, and assigns, upon trust as soon as might be after her decease to sell, call in, and convert into money such parts thereof as should not consist of money, and to get in and receive such parts of her personal estate as should consist of money. And she directed her trustees to stand possessed of the moneys to arise from such sale, calling in, and conversion as aforesaid and to be received by them as aforesaid, and thereinafter referred to as her said trust funds, upon the trusts following (namely), upon trust, in the first place, to pay all the costs and expenses incurred in and about such sale, calling in, conversion, and receipt as aforesaid, and otherwise in relation to her real and personal estate and the administration thereof, and in the next place to pay all her debts and funeral expenses, and to pay to her brother *Thomas Swinburne* (the Plaintiff) the sum of £19 19*s.*, and to her friend *Emma Fryer* the sum of £19 19*s.*, and then upon trust as to one-fourth part of her said trust funds to pay one-third part thereof to her nephew *George Swinburne* (son of her deceased brother *William Swinburne*), another third part thereof to and equally between the two sons of her niece *Ann London*, deceased, and the remaining one-third part thereof to *Ernest Henry London*, the son of her niece *Phœbe London*, deceased. And upon trust as to one other fourth part of her said trust funds to pay one-sixth part thereof unto the child (if only one), or all the children (if more than one) of her nephew *Henry Swinburne*, deceased (son of her brother *Henry Swinburne*, deceased), who should be living at her decease, and, if more than one such child, equally between them as tenants in common; and to pay the remaining five sixth parts thereof unto and equally between her nephews and nieces *Frederick Swinburne*, *Valentine Swinburne*, *James Swinburne*, *Matilda Ilbury*, and *Phœbe Dovell* (sons and daughters of her deceased brother *Henry Swinburne*). And upon trust as to one other fourth part of her said trust funds to pay the same to her brother *Thomas Swinburne* (the Plaintiff), if he should be living at her decease. And upon trust as to the remaining one-fourth part of her said trust funds, to pay the same to *Miranda Swinburne*, widow of her deceased brother *Samuel Swinburne*, if she should be living at her decease; but, if she should die in her lifetime, then upon trust to pay the same to her nephew *Edward Swinburne* (son of her brother *Samuel Swinburne*). And the testatrix declared that, in case of the failure of any of the trusts thereinbefore declared of any of the one-fourth parts of her said trust funds, the one-fourth part, or so much thereof of which the trusts should fail as aforesaid, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail, and if the trusts of one only of such fourth parts should fail the same fourth part should be divided equally *per stirpes* amongst the persons entitled under the trusts thereinbefore declared of the three other fourth parts of the said trust funds.

The action was now heard on further consideration, one of the questions for decision being whether the will operated as an exercise of the power of appointment conferred on the testatrix by the will of her brother *Edward Swinburne.* It was admitted that she had no other testamentary power of appointment.

Cozens-Hardy, Q.C., and *L. B. Seeley*, for the nephew *Frederick Swinburne*:—

The power of appointment has not been well exercised by the will of the testatrix, and the property goes as in default of appointment. She in her will blends the property with her own, and then directs the payment of her debts and funeral expenses and legacies out of the blended fund, and gives half the whole fund to persons who are not objects of the power. The will contains no reference to this particular power, though she had no other power of appointment. It is impossible to assume that she intended to exercise this power.

J. G. Wood, for *Miranda Swinburne*, and her son, the nephew *Edward Swinburne*:—

If the Court should hold that the power was not exercised by the will, a case of election will arise as to those persons who are entitled in default of appointment, and who also take benefits under the will in the testatrix's own property.

Freeman, for the trustees, and for the persons who were interested in upholding the exercise of the power by the will:—

The power is well exercised. There is nothing to shew that the testatrix intended to exercise only a general power of appointment. It is not necessary that there should be an express reference in the will to the power. It is a question of intention to be collected from the whole will: *Bailey* v. *Lloyd* (1); *Pidgely* v. *Pidgely* (2). The direction to pay the debts of the testatrix is not enough to negative an intention to exercise the power: *Ferrier* v. *Jay* (3); *In re Teape's Trusts* (4). The testatrix contemplated the possibility that the gift to persons not objects of the power might fail, for she provides that, in case of the failure of any of the trusts thereinbefore declared, the part as to which the trusts should fail should go over to persons who were objects of the power. This is a provision against intestacy.

Cozens-Hardy, in reply:—

In *Bailey* v. *Lloyd* the Court held that the will contained a reference to the power; the gift was to persons who were objects of the power, but the limitations were unauthorized. In *Ferrier* v. *Jay* the objects of the power were objects of the testator's bounty; the only difficulty was in the charge of the testator's debts. Vice-Chancellor *Malins* followed the decision of Vice-Chancellor *Wood* in *Cowx* v. *Foster* (5). In that case Vice-Chancellor *Wood* said (6): "Where, in the exercise of a power of distribution, the donee of the power introduces objects of bounty who are not objects of the power, it is impossible to say exactly in what shares and proportions the real objects of the power would have taken; and therefore the whole appointment is treated as invalid." That exactly applies to the present case. In *In re Teape's Trusts* the intention was to give to the person who was the object of the power, though the will purported to give her a larger interest than the testator had power to give. No doubt *Pidgely* v. *Pidgely* is more in favour of the exercise of the power. In *Ames* v. *Cadogan* (7) Mr. Justice *Fry* was of opinion that the fact that a benefit is given to persons who are not objects of a power is a strong indication of an intention not to exercise the power. The gift over in case of the failure of any of the trusts thereinbefore declared refers only to a failure by lapse, or by reason of death in the lifetime of the testatrix.

(1) 5 Russ. 330, 341.
(2) 1 Coll. 255.
(3) Law Rep. 10 Eq. 550.
(4) Law Rep. 16 Eq. 442.
(5) 1 J. & H. 30.
(6) Ibid. 35.
(7) 12 Ch. D. 868.

PEARSON, J.

1884

In re SWINBURNE.

SWINBURNE *v.* PITT.

Freeman:—*Ames* v. *Cadogan* (1) was a very peculiar case.

The question of election was then argued.

Higgins, Q.C., and *E. Thurstan Holland*, for the Plaintiff:—

If the Court should hold that the power was not well exercised, a case of election will arise in the Plaintiff's favour. The persons who are objects of the power, and who also take under the will property belonging to the testatrix herself, are bound to carry out her intention *in toto*, if they claim under the will.

[PEARSON, J.:—If in the gift over the words "failure of any of the trusts hereinbefore declared" mean failure from any cause, persons who are objects of the power will take one moiety of the property under the appointment, and will take the other moiety under the gift over.]

"Failure" does not include a failure of the testatrix's own gift by the will.

J. G. Wood, for *Miranda Swinburne*, and for her son, the nephew *Edward Swinburne*:—

The intention of the testatrix was that the beneficiaries under the will should stand on an equal footing, taking the two properties together. Those persons who can take under the appointment, and who take also property of the testatrix, must bring their appointed shares into hotchpot: *Cooper* v. *Cooper* (2). The provision as to failure of any of the trusts does not affect the question. It applies to a failure of a one-fourth share as a whole; not to the failure of the trusts of a portion of a one-fourth share. It does not contemplate a failure by reason of an invalid appointment.

Cozens-Hardy referred to *White* v. *White* (3). There is no case of election; half the property is well appointed in the first instance, and, by virtue of the gift on the failure of any of the previous trusts, the other half goes to persons who are objects of the power.

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(1) 12 Ch. D. 868.

(2) Law Rep. 7 H. L. 53.

(3) 22 Ch. D. 555.

PEARSON, J. :—

The testatrix has contrived to express her will in such a way as to create as much difficulty as possible in the construction of it. [His Lordship referred to the provisions of the will.] The first question is, Did she intend to exercise at all the special power of appointment given to her by her brother's will, or did she only intend to exercise any general power of appointment by will which she might have? It is conceded that she had in fact no other testamentary power of appointment, and if I come to the conclusion that she did not intend to exercise this special power, I shall in fact strike out of the will the words "over which I may have any testamentary power of disposition." I think I cannot do that. The testatrix having referred to any testamentary power of disposition which she might have, and there being no other such power, I think I must come to the same conclusion to which Vice-Chancellor *Knight Bruce* came in *Pidgely* v. *Pidgely* (1), and for the same reason, that she did intend to exercise that power. I think her intention was to exercise the only testamentary power of disposition which she had. It follows that, as regards the brother's property, half of it is well appointed, but that half of it which is appointed to persons who are not objects of the power is not, apart from the gift over, well appointed by the will.

The next question is, What becomes of that moiety of the brother's property which is appointed to persons who are not objects of the power? This depends upon the construction of that which to my mind is a very obscure clause of the will—the gift over in case of the failure of any of the trusts thereinbefore declared of any of the one-fourth parts of the trust funds. But I think the word "failure" must be construed as meaning failure from any cause whatever. I think the intention of the testatrix was that, if, for any reason whatever, any of the beneficiaries under her will could not take any part of that which is given to him by the will, that which he could not take should go over to the other beneficiaries under the will who were capable of taking it. I hold, therefore, that so much of the property subject to the power of appointment as is by the will given to *Thomas Swinburne* and *Miranda Swinburne* goes over to the persons to whom the first two one-fourth parts are given and in the same proportions *inter se*. Consequently no case of election arises.

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(1) 1 Coll. 255.

PEARSON, J.
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Solicitors: *Paterson, Sons, & Garner; Harvey, Oliver, & Capron; Hunt & Son; Thomas Bowker.*

W. L. C.

In re WILKINS.
WILKINS *v.* ROTHERHAM.

[1879 W. 435.]

PEARSON, J.
1884
Aug. 8.

Administration of Assets—Deficient Estate—Abatement of Annuities—Apportionment—Direction to pay Annuity free of Legacy Duty—Costs of Plaintiff in Legatee's Administration Action.

When a testator's estate is insufficient (after payment of his debts) to pay in full annuities given by his will, the fund must (after payment of costs) be apportioned between the annuitants in the proportion which the sums composed of the arrears of the annuity in each case plus the present value of the future payments bear to each other, and this rule applies in a case in which the annuitants are all living at the time of distribution.

Heath v. *Nugent* (1) followed.

A testator gave an annuity of £150 to his widow, and an annuity of £100 to a stranger in blood, and he directed that the second annuity should be paid free of legacy duty, which should be paid out of his estate. After payment of his debts, the estate was insufficient to pay the annuities in full:—

Held, that (after payment of costs) the fund must be apportioned as above between the two annuitants; that the legacy duty payable on the sum apportioned to the second annuitant must be deducted from the whole fund, and the balance then divided in the same proportion between the two annuitants.

It is the settled rule that the plaintiff in a legatee's administration action is, when the estate is insufficient to pay the legacies in full, entitled to receive his costs out of the fund as between solicitor and client, and this rule applies even when there is a contest between him and another legatee as to the proper mode of dividing the fund.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate of *T. H. Wilkins* (who died on the 6th of

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(1) 29 Beav. 226.

PEARSON, J.
1884
In re WILKINS.
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September, 1879), under the direction of the Court. By his will, dated the 31st of January, 1876, the testator, after appointing his sister *Lucy Rotherham* (the Defendant) and his nephew *H. Wilkins* trustees and executrix and executor of his will, and directing his executrix and executor to pay his debts and funeral and testamentary expenses out of his personal estate, gave, devised, and bequeathed unto the Defendant all the residue of his personal estate, and all and every the real estates of which he might die seised and possessed, to hold to her, her heirs and assigns for ever, but subject nevertheless, and the testator thereby charged his real estate and his residuary personal estate with the payment of an annuity of £150 to his wife (the plaintiff), to whom he gave and bequeathed the same accordingly, and he also charged his real estate and his residuary personal estate with the payment of an annuity of £100 to *Johanna Camilla Harry*, to whom he gave and bequeathed the same accordingly. By a codicil dated the 31st of October, 1876, the testator directed that the annuity to Miss *Harry* should be paid free from all Government duties, which should be paid out of his personal estate. Miss *Harry* was a stranger in blood to the testator. After payment of the testator's debts and funeral and testamentary expenses his estate was insufficient to pay the two annuities in full, and the questions now raised for decision were, how the assets were to be apportioned between the two annuitants, and how the legacy duty payable in respect of Miss *Harry's* annuity was to be paid.

W. W. Karslake, Q.C., and *B. Horsbrugh*, for the Plaintiff:—

As to the division of the fund between the two annuitants, the exact point is decided by *Heath* v. *Nugent* (1). In each case the unpaid arrears of the annuity and the present value of the future payments of it must be added together, and the fund must be apportioned between the two annuitants in the proportion which these two gross sums bear to each other: *Todd* v. *Bielby* (2); *Potts* v. *Smith* (3); *Seton* on Decrees (4).

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(1) 29 Beav. 226.
(2) 27 Beav. 353.
(3) Law Rep. 8 Eq. 683.
(4) 4th Ed. vol. ii. pp. 967–8.

The direction to pay the duty on Miss *Harry's* annuity out of the testator's personal estate applies only as between her and the residuary legatee: it does not affect the widow, on whose annuity no duty is payable. There being no residue, the direction is inoperative, and Miss *Harry* must pay the duty on the sum which is apportioned to her: *Seton* on Decrees (1).

[PEARSON, J., referred to *Wilson* v. *O'Leary* (2).]

The estate being insufficient, after the payment of debts, &c., to pay the annuities in full, the Plaintiff is entitled to have her costs out of the fund, as between solicitor and client; *Seton* on Decrees (3); *Cross* v. *Kennington* (4); *Burkitt* v. *Ransom* (5); *Waldron* v. *Frances* (6); *Thomas* v. *Jones* (7); *Wright* v. *Woods* (8). In a legatee's action, when the estate is insufficient to pay the legacies in full, the Court follows the analogy of a creditor's action in which the estate is deficient, and rewards the plaintiff for his diligence by allowing him costs as between solicitor and client.

Cookson, Q.C., and *W. D. Rawlins*, for Miss *Harry*:—

We admit that the fund should be apportioned in the way suggested, but the testator has given Miss *Harry* the duty in addition to the annuity.

[PEARSON, J.:—I wish to hear you only on the question of costs.]

The rule as to a creditor's action does not apply. The reason why a creditor plaintiff is allowed costs as between solicitor and client when the estate is deficient is, that the fund belongs to himself and the other creditors on whose behalf he is suing: *Horne* v. *Horne* (9); *Morgan* and *Wurtzburg* on Costs (10). The Plaintiff is not suing on behalf of Miss *Harry*; she is at arm's length with her.

Dauney, for the Defendant.

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(1) 4th Ed. vol. ii. p. 964.
(2) Law Rep. 17 Eq. 419.
(3) 4th Ed. vol. ii. p. 875.
(4) 11 Beav. 89.
(5) 2 Coll. 536.
(6) 10 Hare, App. x.
(7) 1 Dr. & Sm. 134.
(8) 26 Ch. D. 179.
(9) 14 W. R. 957.
(10) Page 202.

PEARSON, J.:—

The first question is, how the deficiency is to be dealt with—in what proportion the deficient estate is to be divided between the two annuitants. The annuity to the testator's widow is, of course, not liable to any legacy duty; the annuity to Miss *Harry* is liable to pay duty at the rate of 10 per cent. The testator has directed that that duty shall be paid out of his personal estate, and that she shall receive the annuity in full. Mr. *Karslake* says that the proper course is to calculate the amounts which should be paid to the two annuitants according to the rule laid down by Lord *Romilly*, M.R., in *Heath* v. *Nugent* (1), and this is not disputed as a general rule. But it is said that this rule will not work out justice in the present case by reason of the direction to pay the duty on Miss *Harry's* annuity, for that, if the duty is not taken into account before the apportionment is made, the widow will get her apportioned part free of duty, while Miss *Harry* will have to pay the duty on hers. Mr. *Karslake* says that that is what ought to be done, because the direction is to pay the duty out of the residue, and there is no residue. To my mind, as a question of arithmetic rather than of law, Mr. *Karslake* is in error. I think the intention of the testator was that each annuitant should receive that exact proportion of his estate which she would have received if the estate had been sufficient to pay both the annuities in full. In that case Miss *Harry* would have received £100, and the widow would have received £150 a year, each free from any payment of legacy duty, in the case of the widow, because by law she is not liable to pay any duty, and in the case of Miss *Harry*, by reason of the bounty of the testator. In my view the sums which they ought now to receive should be in the same proportion, and I think the only way to effect this will be to pay the duty on Miss *Harry's* apportioned part before dividing the fund, and then to divide the balance between the two annuitants according to the rule laid down in *Heath* v. *Nugent*. In that way only will there be equality between them, the object of the Court being to give each of them her fair and just proportion of the estate. After the payment of costs the fund must be divided as laid down in *Heath* v. *Nugent*; then the duty payable

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(1) 29 Beav. 226.

PEARSON, J.
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on Miss *Harry's* share must be calculated and deducted from the whole fund, and the residue must be apportioned in the same way between the two annuitants.

As to the Plaintiff's costs, having regard to the authorities, I think it is the settled rule of the Court that the plaintiff in a legatee's administration action is, if the estate is insufficient to pay the legacies in full, entitled to his costs out of the fund as between solicitor and client. I do not intend to depart from that rule. I cannot say that I quite understand the principle of it, but I find that it is the established rule.

Solicitors: *W. G. Stuart; Bolton, Robbins, Busk, & Co.; Kingsford, Dorman, & Co.*

W. L. C.

In re KNOWLES' SETTLED ESTATES.

[1884 K. 504.]

PEARSON, J.
1884
Aug. 12.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1—*Definition of Settlement—Original and derivative Settlements—Appointment of Trustees for Purposes of Act.*

When a complete settlement of land has been made, and derivative settlements have been afterwards made by persons who take interests (not yet in possession) under the original settlement, the original settlement alone is the settlement for the purposes of the *Settled Land Act.*

The Court will not in general appoint as trustees of a settlement for the purposes of the Act two persons who are near relatives to each other. There ought to be two independent trustees.

ADJOURNED SUMMONS.

This was a summons under the *Settled Land Act*, 1882.

The summons was entitled "in the matter of the estate situate in *Whitecross Street,* in the county of *Middlesex,* and known as the '*Spread Eagle*' public-house, settled (*inter alia*) by an indenture dated the 15th of April, 1837."

By the indenture of the 15th of April, 1837, certain real estate (including the *Spread Eagle* public-house) was vested in trustees in fee, upon trust during the life of *Maria Knowles,* the wife of *John Knowles,* to pay the rents thereof to her and her assigns for her and their own sole and separate use and benefit, and after her death in trust for the child and children of *John Knowles* by *Maria* his wife, or any one or more of them exclusive of the other or others, in such proportions and in such manner as *John Knowles* should by deed or will appoint, and upon further trusts in default of appointment. The trustees of this deed at the time when the present application was made were *John Parnell* and *Archibald Hanbury*. *Archibald Hanbury* was the solicitor of the tenant for life. On the 9th of October, 1865, *John Knowles* appointed that the property comprised in the deed of the 15th of April, 1837, should, after the death of *Maria Knowles*, be held in trust for his daughter *Mary Eleanor Knowles* in fee, and by a deed dated the 10th of October, 1865, the property thus appointed was, in contemplation of a then intended marriage between *Mary Eleanor Knowles* and the Rev. *Joseph Clarke*, vested in *J. B. Tanqueray-Willaume* and *J. B. Tanqueray-Willaume* the younger in fee, upon trust for *Mary Eleanor Knowles* in fee, until the solemnization of the intended marriage, and, after the solemnization thereof, upon trust to pay the rents to *John Knowles* and his assigns during his life, and after his death on trust to pay the rents to *Mary Eleanor Knowles* for her sole and separate use without power of anticipation, and after her death on trust to pay the rents to *Joseph Clarke* and his assigns during his life, and, after the death of the survivor of *John Knowles*, *Mary Eleanor Knowles*, and *John Clarke*, on certain trusts for the issue of the marriage as therein mentioned, with an ultimate trust for *Maria Eleanor Knowles* in fee. The intended marriage was shortly afterwards solemnized.

This summons was taken out by *Maria Knowles*, the tenant for life under the original settlement (now a widow), asking (*inter alia*) for the appointment of trustees of the settlement for the purposes of the *Settled Land Act*. The summons was not entitled in the matter of the sub-settlement, and it was served only on the trustees of the original settlement. It was proposed to appoint as trustees for the purposes of the Act *John Parnell* and his brother *Hugh Parnell*.

P. S. Gregory, for the summons:—

A question may arise whether the derivative settlement exe-

PEARSON, J.

1884

In re KNOWLES' SETTLED ESTATES.

cuted on the daughter's marriage is part of the "settlement" of the property as defined by sect. 2 of the *Settled Land Act*, 1882, and whether, therefore, the summons should be entitled also in the matter of the derivative settlement, and served on the trustees of that settlement. In Messrs. *Wolstenholme* and *Turner's* book on the Act (1), it is said, "the effect of the definition in this Act appears to be that all the instruments engrafted on the settlement of a given interest must be taken as forming part of one settlement."

PEARSON, J.:—

The original settlement is a complete settlement in itself, and, in my opinion, it is the settlement under the Act. I have nothing to do with any derivative settlement. But I object to appointing two relatives as trustees. There must be two independent trustees.

The further hearing of the summons was ordered to stand over until after the Long Vacation.

Solicitors: *Hanbury, Hutton, & Whitting.*

W. L. C.

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(1) 2nd Ed. p. 10.

V.-C. B.
1884
July 24.

In re WEBSTER.
GUARDIANS OF DERBY UNION *v.* SHARRATT.

[1884 W. 1203.]

Pauper Lunatic—Expenses of Maintenance—Right of Poor Law Guardians to recover against Estate of Lunatic after his Death—Lunatic Asylums Act, 1853 (16 *&* 17 *Vict. c.* 97), *ss.* 94, 104 [*Revised Ed. Statutes, vol. xi. pp.* 805, 809.]

A pauper lunatic having died seised of a small amount of real estate:—

Held, that the amount of sums paid by guardians of the union to which the pauper was chargeable (though not the union in which he died), in respect of his maintenance at a lunatic asylum, was a debt recoverable in a creditors' action against his personal and real representatives, though no steps to recover payment of expenses incurred in respect of such maintenance were taken by the guardians in the pauper's lifetime.

THIS was an action by the guardians of the *Derby Union*, on behalf of themselves and all other creditors of *George Webster*, deceased, against the administratrix and the co-heiresses-at-law of the intestate.

George Webster had been maintained by the Plaintiffs as a pauper lunatic from the 27th of July, 1881, to the 10th of February, 1884, the date of his death, which took place in an asylum at *Leicester*. At his death and during the above period, he was seised in fee of a small cottage and hereditaments, worth about £180. The Plaintiffs had taken no steps during his lifetime to obtain payment of the expenses of his maintenance.

The writ was indorsed for payment of £56 6*s.*, and a summons was now heard on behalf of the Plaintiffs, that pursuant to Order XIV., rule 1, of the Rules of the Supreme Court, an order might be made for payment to them of this amount.

The Chief Clerk being of opinion that the Plaintiffs could not rank as creditors of the deceased's estate, the summons was adjourned into Court.

Hemming, Q.C., and *Russell Roberts*, for the Plaintiffs:—

We are creditors of the intestate. The question turns on the construction of sects. 94 and 104 of the *Lunatic Asylums Act*, 1853 (16 & 17 Vict. c. 97).

By sect. 104, if any person having the custody of any property of a lunatic, pays any money, though without any order of justices, as provided by the former part of the same section, to the guardians of any union, to defray the charges paid or incurred by such union for the maintenance of such lunatic, the receipt of the guardians is to be a good discharge to such person; and see the remarks of the Lords Justices in *In re Marman's Trusts* (1). "The demand of the guardians," says Lord Justice *James*, "must be recovered like any other debt, in a due course of administration."

J. G. Alexander, for the Defendants:—

The only possible right of guardians to claim against the estate of a deceased pauper lunatic is conferred by the latter part of sect. 16 of the *Poor Law Union Charges Act Amendment Act*, 1849 (12 & 13 Vict. c. 103), which is in these words: "And in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease." So that the utmost any guardians can claim is the amount of the burial expenses, plus one year's maintenance. But even to this extent the Plaintiffs are out of Court, not being the guardians of the union in which the pauper died.

The Plaintiffs took no proceedings under the *Lunatic Asylums Act*, 1853, during the intestate's lifetime, and it is clear that the provisions of that Act are intended to take effect only during the life of the pauper lunatic. In *In re Marman's Trusts* the question of debt or no debt was not before the Court. All the Lords Justices held was, that if there was a debt, it must be claimed in the ordinary course of administration.

BACON, V.C.:—

I entertain no doubt whatever that under the statute the estate of this pauper lunatic is liable for his maintenance, whether he be alive or dead; and this I understand to have been

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(1) 8 Ch. D. 256, 259.

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the view of the Lords Justices in the case which has been referred to.

I think the Defendants cannot take any part of the intestate's estate without accounting for the portion of it which is so liable.

Solicitors: *Brook & Chapman,* for *Mole & Stone, Derby*; *Berry, Binns, & Lincoln,* for *W. Briggs, Derby.*

J. B. D.

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ARTIZANS' DWELLINGS ACTS—*Artizans and Labourers Dwellings Improvement Act,* 1875 (38 & 39 *Vict. c.* 36)—*Compulsory taking of Land—Arbitration Award—Payment of Sum awarded into Court—Appeal—Verdict of Jury for larger Sum—Payment of Difference into Court—Time of taking Possession—Interest on Difference.*] Where, under the provisions of the Artizans and Labourers Dwellings Improvement Act, 1875 (38 & 39 Vict. c. 36), a sum of money has been paid into Court by a local authority under the award of an arbitrator for lands taken compulsorily by them, and on appeal a verdict for a larger sum is given by a jury, the difference between the two sums being subsequently paid into Court, interest at £4 per cent. per annum from the date of the first payment to the date of the second payment in is payable on such difference. *In re* Shaw and the Corporation of Birmingham - 614

ATTACHMENT - - - - - 66
See Practice. 4.

AUDITED ACCOUNTS—Benefit society—Impeaching accounts - - - 111
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AWARD—Compulsory purchase of land - 614
See Artizans Dwellings Act.

BANKRUPTCY — *Certificate of Conformity — Effect of Suspending Order—Bankruptcy Act,* 1842 (5 & 6 *Vict. c.* 122), *ss.* 37, 39—*Bankrupt Law Consolidation Act,* 1849 (12 & 13 *Vict. c.* 106), *s.* 199.] In July, 1848, an order was made that the grant of a certificate of conformity to a bankrupt be suspended for three years.—During the period of suspension, the Bankruptcy Act of 1849 came into operation; which provided (s. 199) that "every certificate of conformity, allowed by any Commissioner before the time appointed for the commencement of this Act, though not confirmed according to the laws in force before that time, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made provable under the fiat":—*Held,* that, as, by virtue of that section, confirmation of the order of July, 1848, was no longer required, that order became, at the expiration of the period of suspension, of itself a complete discharge to the bankrupt, and that property acquired by him after the expiration of that period belonged to him and not to the assignee in the bankruptcy. *In re* Dove. Bousfield *v.* Dove - - 687

2. —— *Proof—Loan from Building Society—Premium payable in Instalments.*] A member of a building society borrowed from the society, on the security of a mortgage, £1200, for which he was to pay £144 premium and interest at 5 per cent. per annum. The principal, premium, and interest were made payable by the borrower to the society in a fixed number of monthly instalments, each of which consisted of principal, premium, and interest. The borrower having filed a liquidation petition, and the mortgage being insufficient:—*Held* (affirming the decision of Bacon, C.J.), that the premium was not in the nature of interest, and that the society were entitled to prove for it in the liquidation. *Ex parte* Bath. *In re* Phillips - - - C. A. 509

—— Tenant for life—Power of consenting 565
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BILL OF COSTS—Taxation - 485, 544, 584
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BUILDING SOCIETY—Loan from—Proof in bankruptcy - - - - 509
See Bankruptcy. 2.

CAPITAL—Charge on—Land drainage - 349
See Settled Land Act. 1.

—— Income—Permanent improvements - 196
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CASES—*Abram* v. *Cunningham* (2 Lev. 182) distinguished - - - - 220
See Administrator.

—— *Ames, In re* (25 Ch. D. 72) distinguished
See Solicitor. 2. [584

—— *Auckland (Lord)* v. *Westminster District Board of Works* (Law Rep. 7 Ch. 597) distinguished - - - 362
See Metropolis Management Acts.

—— *Ballard* v. *Tomlinson* (26 Ch. D. 194) dissented from - - - - 588
See Water. 1.

—— *Bartlett* v. *Rees* (Law Rep. 12 Eq. 395) followed - - - - 246
See Mortgage. 1.

—— *Bellamy and Metropolitan Board of Works, In re* (24 Ch. D. 387) followed - 592
See Vendor and Purchaser. 3.

CASES—*continued.*

—— *Boyes* v. *Cook* (14 Ch. D. 53) followed 284
See Power. 1.

—— *Campbell's Case* (Law Rep. 9 Ch. 1) followed
See Company. 1. [268

—— *Clarke's Trusts, In re* (21 Ch. D. 748) questioned - - - - 411
See Husband and Wife. 3.

—— *Commercial Bank of India, In re* (Law Rep. 6 Eq. 517) approved - - 225
See Company. 6.

—— *Croughton's Trusts, In re* (8 Ch. D. 460) followed - - - - 411
See Husband and Wife. 3.

—— *Day* v *Whittaker* (6 Ch. D. 734) followed
See Practice. 7. [242

—— *Dronfield Silkstone Coal Company, In re* (23 Ch. D. 511) not followed - 33
See Company. 3.

—— *Ellis' Trusts, In re* (Law Rep. 17 Eq. 409) distinguished - - - 411
See Husband and Wife. 3.

—— *Ennor* v. *Barwell* (1 D. F. & J.) 529) distinguished - - - - 356
See Practice. 8.

—— *Ferguson* v. *Gibson* (Law Rep. 14 Eq. 379) considered - - - - 478
See Retainer.

—— *Flamank, Ex parte* (1 Sim. (N.S.) 260) dissented from - - - - 309
See Lands Clauses Act. 1.

—— *Glenny and Hartley, In re* (25 Ch. D. 611) commented on - - - 333
See Trustee.

—— *Green* v. *Low* (22 Beav. 625) distinguished
See Option of Purchase. [394

—— *Heath* v. *Nugent* (29 Beav. 226) followed
See Administration. [703

—— *Home Investment Society, In re* (14 Ch. D. 167) followed - - - 33
See Company. 3.

—— *Hutchinson* v. *Copestake* (9 C. B. (N.S.) 863) considered - - - - 43
See Light.

—— *Imperial Hydropathic Hotel Company* v. *Hampson* (23 Ch. D. 1) discussed and explained - - - - 268
See Company. 1.

—— *Labouchere* v. *Dawson* (Law Rep. 13 Eq. 322) overruled - - - - 145
See Goodwill.

—— *McMurray* v. *Spicer* (Law Rep. 5 Eq. 527) considered - - - - 359
See Trustee Acts.

—— *Palmer* v. *Temple* (9 Ad. & E. 508) distinguished - - - - 89
See Vendor and Purchaser. 4.

—— *Pawsey* v. *Armstrong* (18 Ch. D. 698) questioned - - - - 460
See Partnership.

—— *Rylands* v *Fletcher* (Law Rep. 3 H. L. 330) followed - - - - 588
See Water. 1.

—— *Smith* v. *Day* (21 Ch. D. 421) dictum of Jessel, M.R., dissented from - 474
See Practice. 10.

—— *Stewart* v. *Jones* (3 De G. & J. 532) followed
See Will. 3. [346

—— *Tapling* v. *Jones* (12 C.B. (N.S.) 826; 11 H. L. C. 290) considered - - 43
See Light.

—— *Templer's Trusts, In re* (4 N. R. 494) considered - - - - 359
See Trustee Acts.

—— *Travis* v. *Illingworth* (2 Dr. & Sm. 344) approved and followed - - 333
See Trustee.

—— *Unsworth* v. *Speakman* (4 Ch. D. 620) disapproved - - - - 346
See Will. 2.

—— *Upmann* v. *Forester* (24 Ch. D. 231) followed
See Copyright. [260

—— *Uruguay Central and Hygueritas Railway Company of Monte Video* (11 Ch. D. 372) distinguished - - - 278
See Company. 5.

—— *Veal* v. *Veal* (27 Beav. 303) followed 631
See Donatio Mortis Causâ.

CERTIFICATE OF CONFORMITY - - 687
See Bankruptcy. 1.

CHAMBERS—Practice in - - - 687
See Practice. 5.

CHARITY—*Mortmain—Bequest to Charity—Impure Personalty—Interest in Land—Mortgage of Interest in Trust Fund invested on Mortgage of Real Estate—9 Geo. 2, c. 36.*] A testator gave the residue of such part of his personal estate as could by law be bequeathed for charitable purposes on trust for charities. At the time of his death his personal estate comprised: (1.) A sum of £100 due to him on the security of a mortgage of the life interest of a lady under the will of her father in the sum of £3000. The £3000 was invested in the names of the trustees of the father's will on a mortgage of real estate; (2.) A sum of £800 due to the testator on a mortgage of the life interest of a widow lady in the funds subject to the trusts of her marriage settlement, and of the vested reversionary interest of one of her two daughters in a moiety of those funds. The greater part of the trust funds was invested in the names of the trustees of the settlement on mortgage of real estates; (3.) A sum of £200 due to the testator on the security of a mortgage of the same life interest, and of the vested reversionary interest of the other daughter in the other moiety of the trust funds:—*Held*, that, under the mortgage to secure the £100 the testator took no interest in land, and that the £100 could be legally bequeathed by him to charitable purposes.—But *held*, that the other two mortgages must be looked at together, and that as, by foreclosing them both, the testator could have acquired the whole trust fund in its state of investment on mortgage of real estate, he had by virtue of the two mortgages an interest in land, and the two mortgage debts could not be legally bequeathed to charitable purposes. *In re* Watts. Cornford v. Elliott - - - - - 318
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CHARITY—*continued.*

—— Trade or business—Covenant in lease 71
See COVENANT. 1.

CHEQUES—Donatio mortis causâ - - 631
See DONATIO MORTIS CAUSÂ.

COMPANY—*Purchase by Company of its own Shares—Reduction of Capital—Power to alter Articles of Association—Resolution effecting two Objects.*] A company having formed a scheme for reducing their capital by the purchase of fully paid shares, and this being in violation of their articles of association, passed a resolution at a general meeting: "That notwithstanding anything contained in the articles, the directors be authorized to carry out the following compromise or modification of the agreement with the vendors," which was in effect to cancel 12,000 fully paid vendors' £5 shares upon payment of £1 3*s.* 4*d.* per share:—*Held*, that this resolution was valid, notwithstanding that the effect of it was to carry out two distinct objects, viz., to set aside for the purpose of this transaction the article forbidding the purchase of shares, and to authorize the directors to carry out the proposed scheme.—*Imperial Hydropathic Hotel Company* v. *Hampson* (23 Ch. D. 1) discussed and explained. —*Campbell's Case* (Law Rep. 9 Ch. 1) followed. TAYLOR *v.* PILSEN JOEL AND GENERAL ELECTRIC LIGHT COMPANY - - - - 268

2. —— *Qualification of Directors provided by Promoter—Joint and several Liability.*] The first five directors of a company being bound by the articles of association to hold twenty shares each as a qualification, accepted, with the knowledge and approval of each other, twenty fully paid shares each from the promoter who had received them as cash from the company;—*Held*, upon summons by the official liquidator in the winding-up, that all the directors were jointly and severally liable to pay the full value of the shares.—One only of the five directors, upon finding that he was not justified in receiving the shares without payment, offered to pay the full sum due from him, and gave a cheque for the amount, which, however, was accepted as an advance to the company, and was added to previous advances made by him for preliminary expenses: —*Held*, that this director was not at liberty to set off the value of his shares against the amount paid in respect of advances, though he would have a claim against the company for those advances. *In re* CARRIAGE CO-OPERATIVE SUPPLY ASSOCIATION - - - - - - 322

3. —— *Winding-up—Costs of Successful Litigant—General Costs of Liquidation—Priority of Payment.*] In the winding-up of a company the liquidator changed his solicitor. The first solicitor claimed to be paid his costs. The liquidator set up in defence that he had, in pursuance of an order of the Court, paid away part of the assets in discharging the costs of an unsuccessful attempt to settle an alleged shareholder on the list of contributories, and that the only remaining assets amounted to £9, which was quite insufficient to pay the applicant, and which he claimed to retain for costs out of pocket:—*Held* (affirming the decision of Pearson, J.), that the successful litigant whose costs were ordered to be paid by the liquidator,

COMPANY—*continued.*

was entitled to immediate payment of those costs in priority to the general costs of liquidation including costs of realization; and that the remaining assets, amounting to £9, must be apportioned equally between the liquidator and the applicant. —*In re Home Investment Society* (14 Ch. D. 167) followed; *In re Dronfield Silkstone Coal Company* (23 Ch. D. 511) not followed.—The order giving the costs to the successful litigant directed that they should be paid by the official liquidator, and that he should be at liberty to retain them out of the assets of the company:—*Held*, that this form of order gave the official liquidator the right to repay himself the costs out of the assets in priority to all other creditors. *In re* DOMINION OF CANADA PLUMBAGO COMPANY - **C. A.** 33

4. —— *Winding-up Petition—Cost-book Mine —Stannaries Court—Order for Inspection of Documents*—18 & 19 *Vict. c.* 32, *s.* 22.] The practice of the Stannaries Court is the same as that of the High Court of Justice, that the mere fact of a winding-up petition is not enough to justify an order for inspection of books. But if grounds are shewn, the petition may properly be ordered to stand over to allow the petitioner to enforce his right as a shareholder to inspection.—The right of inspection under the 22nd section of the Stannaries Act, 1855, is personal to the shareholder, and does not extend to his solicitors or agents. *In re* WEST DEVON GREAT CONSOLS MINE - - - **C. A.** 106

5. —— *Winding-up — Petition — Creditor — Debenture-holder—Trust Deed—Debenture payable to Bearer—Debenture held as Security—Inquiry as to existence of Assets—Appointment of Provisional Liquidator with Powers of Official Liquidator— Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 86, 92.] A company issued debentures payable to bearer, the payment of which was secured by a deed by which the company purported to assign all their present and future property to trustees, on trust for the benefit of the debenture-holders, and covenanted with the trustees for payment of the principal and interest of the debentures. By the debentures the company agreed to pay the amount thereby secured to the bearer:—*Held*, that the holder of some of the debentures the interest on which was overdue (the debentures having been deposited with him by the original holder as security for a debt) was entitled to petition for the winding-up of the company.—*In re Uruguay Central and Hygueritas Railway Company of Monte Video* (11 Ch. D. 372) distinguished. —There being some evidence that the company had no assets beyond the property comprised in the trust deed, the Court directed an inquiry in Chambers whether the company had any and what assets not included in the deed and available for the general creditors, and referred it to Chambers to appoint a provisional liquidator, with all the powers of an official liquidator, but the liquidator was to take no steps without the direction of the Judge in Chambers, beyond taking possession of the company's property within the jurisdiction, including their books and papers. *In re* OLATHE SILVER MINING COMPANY - - - - - - 278

6. —— *Winding-up—Petition—Foreign Company with Branch Office, Assets and Liabilities in*

COMPANY—*continued.*

England—Jurisdiction to wind up—Pending Foreign Liquidation—Companies Act, 1862, s. 199.] The Court has jurisdiction under sect. 199 of the Companies Act, 1862, to wind up an unregistered joint stock company, formed, and having its principal place of business in New Zealand, but having a branch office, agent, assets, and liabilities in England.—The pendency of a foreign liquidation does not affect the jurisdiction of the Court to make a winding-up order, in respect of the company under such liquidation, although the Court will as a matter of international comity have regard to the order of the foreign Court.—It being alleged that proceedings to wind up the company were pending in New Zealand, the Court, in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors pari passu with those in New Zealand, sanctioned the acceptance of an undertaking by the solicitor for the English agent of the company, that the English assets should remain in statu quo until the further order of the Court.—*In re Commercial Bank of India* (Law Rep. 6 Eq. 517) approved. *In re* Matheson Brothers, Limited - - - 225

7. —— *Winding-up—Witness—Examination of former Officer under Companies Act, 1862 (25 & 26 Vict. c. 89), s. 115—General Order of the 11th of November, 1862, Rule* LX.—*Leave to Creditor to attend "the Proceedings"—Right of Creditor to be present.*] A person who had brought in a large claim as creditor of a company which was being wound up, obtained an order giving him liberty to attend the proceedings in this matter at his own expense." The liquidator afterwards took out a summons under sect. 115 for the examination of a former officer of the company with a view to obtaining information as to the circumstances under which the claim of the alleged creditor arose, the alleged creditor claimed a right to be present at the examination:—*Held* (affirming the decision of Bacon, V.C.), that he ought not to be allowed to be present at the examination. *In re* Norwich Equitable Fire Assurance Company - - - - **C. A. 515**

COMPENSATION—Artizans' Dwellings Act 614
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COMPULSORY PURCHASE—Artizans' Dwellings Act - - - - - 614
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—— Elementary Education Act - - 639
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CONDITIONS OF SALE - - 172, 555
See Vendor and Purchaser. 1, 2.

CONSENSUS AD IDEM—Contract from letters 497
See Contract.

CONSENT—Power of advancement—Tenant for life—Bankruptcy - - - 565
See Power. 3.

CONTRACT—*Correspondence—Consensus ad idem—Misunderstanding of Parties as to Subject-matter of Negotiation.*] A negotiation took place as to the sale by L. to P. of a British patent and certain foreign patents for the same inventions, and ultimately an offer was made for sale at £500 and accepted by letter, but it was not quite clear whether the offer and acceptance related to all the patents, or to the British patent only. P. brought his action for specific performance, treating the contract as including all the patents, and moved for an injunction to restrain L. from parting with them. At the hearing of the motion he asked for leave to amend his writ, and for an injunction as to the British patent only:—*Held*, by Kay, J., that as L. had understood that he was negotiating about the British patent only, and P. that he was negotiating as to all the patents, there never was the consensus ad idem which is necessary to make a contract; that there was, therefore, no contract which P. could enforce; and that an injunction must be refused.—*Held*, on appeal, that an injunction should be granted, for that where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that the defendant did not understand it according to what the Court holds to be its true construction, the fact that the plaintiff has put an erroneous construction upon it, and insisted that it included what it did not include, does not prevent there being a contract, nor preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits to be its true construction. Preston *v.* Luck - - - **C. A. 497**

CONTRACT—Rescission - - 172, 555
See Vendor and Purchaser. 1, 2.

CONTRARY INTENTION—Will speaking from death - - - - - 600
See Will. 5.

CONTRIBUTORY—Director—Qualification 322
See Company. 2.

CONVENIENCE, BALANCE OF - - 43
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CONVERSION—Lunatic—Sale of land under Lands Clauses Act - - - 309
See Lands Clauses Act. 1.

CONVEYANCE—Payment of purchase-money
See Vendor and Purchaser. 3. [592

COPARCENERS—Trustee Act—Vesting order
See Trustee Acts. [359

COPYHOLD—*Trustees—Customary Heiress of Devisee of Surviving Trustee—Right of Escheat—Mandamus.*] A testatrix who died in 1851 devised her copyhold property to a trustee in trust to pay the rents and profits to J. King for life, and after her death to certain charitable purposes which were void under the Mortmain Acts. The testatrix died without heirs. The trustee named in the will refused the trust, and two trustees were appointed by order of the Court in 1853, who were admitted upon the court rolls to hold upon the trusts of the will. One trustee died in 1873, and the surviving trustee, who died in 1877, devised his trust estates to two trustees, neither of whom was admitted to the copyholds. The survivor of these trustees made no devise of his trust estates and died leaving his youngest daughter, Janet Hawkins, his customary heiress according to the custom of this manor. The

COPYHOLD—*continued.*
tenant for life under the will died in 1883:—*Held*, that Janet Hawkins, who claimed by escheat and under a resulting trust, was entitled to be admitted as tenant to the copyhold property for her own benefit as against the lord of the manor. Gallard *v.* Hawkins - - 298

COPYRIGHT—*Registered Design—Article erroneously marked—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 51, 113—*Designs Rules*, 1883, *r.* 32—*Costs—Innocent Infringer—Notice before Action.*] Sect. 51 of the Patents, Designs, and Trade-marks Act, 1883, applies to the delivery on sale of articles to which a design registered under the Act 5 & 6 Vict. c. 100, has been applied, and the marking of such goods since the Act of 1883 came into operation is regulated by that Act. Consequently, the proprietor of a design registered under the Act 5 & 6 Vict. c. 100, is in a proper case entitled to the benefit of the proviso contained in sect. 51, which relieves him from the forfeiture of his copyright resulting from the omission to mark the articles with the prescribed mark, if he shews that he "took all proper steps to ensure the marking."—The proprietor of a registered design instructed the manufacturer, who made for him the articles to which the design was applied, to stamp the proper mark upon them, and furnished him with a die for the purpose. By inadvertence the manufacturer marked some of the articles with a mark which belonged to another design registered by the same proprietor, the copyright of which had expired, using for the purpose by mistake an old die which remained in his possession, and the proprietor, after the Act of 1883 came into operation, sold some of the articles thus wrongly marked without observing the error. The letters Rd. formed part of both the marks:—*Held*, that the proprietor had not forfeited his copyright, but that he was protected by the proviso in sect. 51.—*Held*, that an innocent infringer of a registered design must pay the costs of a motion for an injunction to restrain him from infringing, though the Plaintiff had given him no notice of the infringement before serving him with the writ in the action.—*Upmann* v. *Forester* (24 Ch. D. 231) followed. Wittman *v.* Oppenheim - - - - - 260

CORNER HOUSE - - - - 362
See Metropolis Management Act.

COST-BOOK MINE - - - - 106
See Company. 4.

COSTS—Administration action - - 703
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—— District registry—Administration action
See Practice. 7. [242

—— Infringement of copyright—Innocent infringer - - - - 260
See Copyright.

—— Mortgage suit—Apportionment - 679
See Mortgage. 2.

—— Taxation of bill of costs 485, 544, 584
See Solicitor. 1, 2, 3.

—— Winding-up - - - - 33
See Company. 3.

COUNTY COURT—Transfer of action to - 533
See Practice. 13.

COUNTY COURT RULES, 1875—Order xx. r. 1
See Practice. 13. [533

COVENANT—*Lease—Restriction against Trade or Business — Charitable Institution where no Payment received — Home for Working Girls.*] The lease of a house contained a covenant that the lessee should not use, exercise, or carry on upon the premises any trade or business of any description whatsoever:—*Held* (affirming the decision of Pearson, J.), that a charitable institution called a "Home for Working Girls," where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of the covenant.—It is not essential that there should be payment in order to constitute a business; nor does payment necessarily make that a business which without payment would not be a business. Rolls *v.* Miller - - **C. A.** 71

2. —— *Lease — Restriction against Trade, Business, Occupation, or Calling—Hospital.*] The covenants of a lease restrained the tenant from using the house in the exercise of any trade, business, occupation, or calling whatsoever. The Defendants were an incorporated association for providing patients willing to pay with medical attendance, nursing, &c.;—*Held*, that this was a violation of the covenant. Portman *v.* Home Hospital Association - - - 81, n.

CREDITOR—Winding-up of company—Right to attend examination of officer - 515
See Company. 7.

CROWN—Forfeiture of gale—Election - 652
See Mine.

CUSTOMERS—Solicitation of - - 145
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DAMAGES—Undertaking as to - - 474
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DEAN FOREST - - - - 652
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DEBENTURE—Holder of—Petition to wind up company - - - - 278
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DELAY—Devastavit by executor - - 622
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DESIGNS—Copyright - - - 260
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DIRECTIONS TO PAY DEBTS - - 696
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DOCUMENTS—Inspection of—Stannaries Court
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—— Production of - - - - - 1
See Practice. 11.

DOMICIL—Foreign husband—English settlement - - - - - - 284
See Power. 1.

DONATIO MORTIS CAUSÂ—*Cheque payable to Donor or Order.*] A cheque payable to the donor or order and, without having been indorsed by him, given by the donor during his last illness to his son, stands on the same footing as a promissory note or bill of exchange payable to the donor or order, and, following *Veal* v. *Veal* (27 Beav. 303), will pass to the son by way of *donatio mortis causâ*. Clement *v.* Cheesman - - 631

DRAINAGE - - - - - - 665
See Local Government Acts.

EASEMENT—Light - - - - 43
See Light.

ELECTION—*Married Woman—Restraint on Anticipation.*] In the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the instrument, been made inalienable. *In re* Wheatley. Smith *v.* Spence - - 606

—— Invalid appointment - - - 696
See Power. 2.

ELEMENTARY EDUCATION ACT, 1870 (33 & 34 *Vict. c.* 75), *ss.* 19, 20, 22—*Compulsory Purchase of Lands—Agreement for Exchange with Third Party prior to Notice to Treat.*] A School Board served on R. the customary notice to treat for land belonging to him, all the requisite preliminaries required by the Elementary Education Act, 1870, having previously been complied with. —Prior, however, to the service of such notice to treat and to the passing of the Confirmation Act as required by the above Act, the Board had entertained and adopted, subject to the sanction of the Education Department, a proposal from one B., a neighbouring landowner, for exchanging a portion of the land to be acquired by the Board from R. for a piece of B.'s land, he undertaking to form the land so to be conveyed to him by the Board into a public road. There was evidence to shew that such road, when made, would be advantageous to the school intended to be erected:—*Held*, on motion by R. for an injunction to restrain the Board from putting in force their statutory powers with respect to so much of the land comprised in the notice to treat as they proposed to convey to B., that the Board were justified in the course they had taken, and could, if they obtained the sanction of the Education Department, carry out the proposal. Rolls *v.* School Board for London - - - - - - 639

ENLARGEMENT OF TIME - - - 237
See Practice. 3.

EQUITY TO A SETTLEMENT - - 220
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ESCHEAT—Admission to copyholds - 298
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EVIDENCE—Examination abroad - - 137
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EXAMINATION—Winding-up—Officer of company - - - - - 515
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—— Witness abroad - - - - 137
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EXCHANGE—Agreement for—Before notice to treat - - - - - 639
See Elementary Education Act.

EXECUTOR—*Devastavit—Laches.*] Mere laches in abstaining from calling upon the executors to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the executors for devastavit, unless there has been such a course of conduct, or express authority, on his part that the executors have been thereby misled into parting with the assets, available to answer his claim. *In re* Birch. Roe *v.* Birch - - 622

—— Solicitor—Professional charges - 584
See Solicitor. 2.

EXTINCTION OF POWER - - - 565
See Power. 3.

FALSE REPRESENTATION—*Vendor and Purchaser—Sale under the Direction of the Court—Misrepresentation by Purchaser—Suppression of Facts by Purchaser.*] The life interest of H. in a fund of about £300,000 was put up for sale in a suit for the administration of the estate of a testator who had purchased it. An attempted sale by auction having proved abortive, C., a solicitor, and B., an actuary, stated to L. & Co., the solicitors who conducted the sale, that they could produce evidence as to the life of H. which would induce the Court to accept a less sum than the supposed value, and that they were prepared to make an offer on behalf of themselves and four others, including H. The negotiation proceeded, and pending the settlement of a draft contract, B. prepared and sent to L. & Co., to be laid before the Judge, a "skeleton case," which stated that H. had been examined by three specified medical men on behalf of the three insurance offices of which they were the respective medical examiners, and set out their joint opinion that the insurance of the life of H. was very hazardous, and should not be accepted at a less addition than fifteen years to his age, and that the whole premiums should be paid within ten years. It further stated that one of the three medical men had informed B. that he should advise his office to decline the proposal—which was thereupon withdrawn; that another of the offices refused to insure; and that

FALSE REPRESENTATION—*continued.*
the third consented to insure for £5000 at a £12 per cent. premium. It set out separate opinions of later date by two of the three medical men which were at least as unfavourable as the joint opinion, and concluded with the statement that H. had not since been examined on behalf of any life office. The Judge upon these materials took the opinions of actuaries, and when their reports were brought before him B. urged upon him that the income was liable to be reduced to £9000 by investment in Consols, and he sanctioned an agreement for purchase at £40,000, which was about the value of the life interest if the income was taken at £9000 and the life as only insurable at a £12 per cent. premium. The sale was completed, and nine years afterwards an action was brought on behalf of the creditors of the testator to impeach it. It appeared that, at the time when the skeleton case was made out, C. and B. had in their hands a later opinion by one of the abovementioned medical officers to the effect that a £10 per cent. premium would be the fair one, and before the contract was approved by the Judge several Scotch offices had agreed to grant, at premiums of £10 11*s.* payable for ten years, insurances for sums sufficient in the whole to cover the purchase-money, and an English office had expressed its willingness to grant an insurance for £4000 on still more favourable terms. None of these facts were mentioned in the skeleton case or disclosed to the Judge :—*Held* (reversing the judgment of Fry, J.), that the sale must be set aside, for that C. and B. knew that the materials which they laid before the Judge to enable him to form his opinion whether the sale should be sanctioned were incomplete, and calculated to produce the false impression that the life could only be insured at £12 per cent., and that the sanction of the Judge must therefore be regarded as obtained by fraud.—A person desirous of buying property which is being sold under the direction of the Court must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses which is material to enable the Court to form a correct opinion, and he will not be held excused from so doing because the Court does not ask for further information :—*Held*, that if the Scotch insurances were known to L. & Co., the solicitors conducting the sale (a fact which the Court considered not proved), the Defendants could not successfully contend that they were not responsible for the failure of L. & Co. to mention them to the Judge, for that it was the duty of B., who took an active personal part in obtaining the sanction of the Judge, and who had reason to believe that the Judge did not know of them, to see that he was informed of them. BOSWELL *v.* COAKS - - - - - **C. A. 424**

FANCY NAME—Trade-mark - - **681**
See TRADE-MARK. 1.

FORECLOSURE - - - **246, 679**
See MORTGAGE. 1, 2.

FOREIGN COMPANY—Winding-up - **225**
See COMPANY. 6.

FOREIGN TRADE-MARK - - - **570**
See TRADE-MARK. 2.

FOREIGNER—Marriage of Englishwoman with
See POWER. 1. [284

FORFEITURE OF DEPOSIT - - **89**
See VENDOR AND PURCHASER. 4.

FORFEITURE OF GALE - - - **652**
See MINE.

FRAUD—False representation - - **424**
See FALSE REPRESENTATION.

—— User of trade-mark - - - **570**
See TRADE-MARK. 2.

FRAUDULENT CONVEYANCE—13 *Eliz. c.* 5—*Laches.*] A specialty creditor brought an action to set aside a conveyance as fraudulent under 13 Eliz. c. 5, nearly ten years after the death of the grantor. The Plaintiff had been aware of the facts during the whole of that period, and gave no satisfactory reason for his delay ;—*Held* (affirming the decision of North, J.), that as the Plaintiff was coming to enforce a legal right his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal right, the case standing on a different footing from a suit to set aside on equitable grounds a deed which was valid at law. *In re* MADDEVER. THREE TOWNS BANKING COMPANY *v.* MADDEVER - **C. A. 523**

FREE MINERS - - - - **652**
See MINE.

GALE—Forfeiture of - - - **652**
See MINE.

GENERAL LINE OF BUILDINGS - - **362**
See METROPOLIS MANAGEMENT ACT.

GENERAL ORDERS IN WINDING-UP, 1862, Rule LX. - - - - - **515**
See COMPANY. 7.

GOODWILL—*Sale of Goodwill—Vendor setting up new Business—Right to solicit old Customers.*] T. P., as trustee of a will, carried on a business which had been carried on by the testator under the name of James P. By an agreement made to compromise a suit, James P., a son of the testator and a beneficiary under his will, agreed to sell to T. P. all his interest in the business, and in the property on which it was carried on. And it was provided that nothing in the agreement should prevent James P. from carrying on the like business where he should think fit, and under the name of James P. T. P. brought this action to enforce this agreement, and to restrain James P. from soliciting the customers of the old firm. An injunction was accordingly granted by Kay, J., on the authority of *Labouchere* v. *Dawson* (Law Rep. 13 Eq. 322) and the cases in which it had been followed :—*Held*, by Baggallay and Cotton, L.JJ., dissentiente Lindley, L.J., that *Labouchere* v. *Dawson* was wrongly decided, and ought to be overruled, and that even apart from the proviso in the agreement, the Plaintiff was not entitled to the injunction which he had obtained.—*Held*, by the whole Court, that the proviso in the agreement authorized the Defendant to carry on business in the same way as any stranger might lawfully do, and took the case out of the authority of *Labouchere* v. *Dawson*, supposing that case to have been well decided. PEARSON *v.* PEARSON **C. A. 145**

GUARDIANS OF POOR—Maintenance of lunatic
See LUNATIC. 3. [710

HEIR-LOOMS—Reference to deed of entail not in existence - - - - - 196
See Will. 2.

—— Sale of—Settled Land Act - - 179
See Settled Land Act. 3.

HEIR-AT-LAW—Retainer for debts - 478
See Specialty Debt.

HOME FOR WORKING GIRLS—Covenant not to carry on business - - - 71
See Covenant. 1.

HOSPITAL—Covenant not to carry on business [81, n.
See Covenant. 2.

HOUSE—Notice to treat - - - 536
See Lands Clauses Act. 2.

HUSBAND AND WIFE—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 5—*Reversionary Interest—Accruer of Title in Possession after Commencement of Act.*] Property to which a married woman was, at the commencement of the Married Women's Property Act, 1882, entitled in reversion or remainder, and which since the Act has fallen into possession, is within s. 5, and may be transferred and paid to her upon her separate receipt. Baynton *v.* Collins - 604

2. —— *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (3) *and* (4)—*Separate Property—Order of Reference by Consent.*] Sect. 1 (3) and (4) of the Married Women's Property Act, 1882, have not a retrospective operation so as to include contracts entered into by a married woman before the date of the commencement of the Act.—But an order made after the commencement of the Act by consent in an action by a creditor against a married woman in respect of her contract before the Act, by which order all questions under the contract were referred to an arbitrator, and the parties bound themselves to abide by, obey, perform, and keep the award, is an agreement by the married woman after the commencement of the Act, within sect. 1 (3), and therefore by sect. 1 (4) any separate estate which she had at or after the date of such agreement is liable to pay the amount found by the award to be due from her under the contract. Conolan *v.* Leyland - - - 632

3. —— *Separate Use—Restraint on Anticipation—Income-bearing Fund.*] Where a testator makes a bequest to a married woman for her separate use absolutely, and follows it by a clause restraining her from anticipation, the question whether the restraint on anticipation is effectual does not depend on the question whether it is a gift of an income-bearing fund or of a sum of cash, but whether the testator has or has not shewn an intention that the trustees should keep the investment and pay the income to the married woman. — A testatrix directed her trustees to raise and invest a sum of £4500, and to pay the income to B. during her life, and after her death to hold two shares in trust for two of her nieces for life, and then for their children, and as to one other share to pay it to the daughters of a deceased niece, and as to the remaining share to pay it to H., a married woman, for her separate use without power to anticipate the same, and her receipt alone to be a sufficient discharge.—*Held* (reversing the decision of Kay, J.), on the construction of the will, that on the death of B., H. was entitled to receive the capital of her share, notwithstanding the restraint on anticipation.—*In re Ellis' Trusts* (Law Rep. 17 Eq. 409) distinguished. *In re Clark's Trusts* (21 Ch. D. 748) questioned. *In re Croughton's Trusts* (8 Ch. D. 460) followed. *In re* Bown. O'Halloran *v.* King - C. A. 411

—— Bequest by will to—Unity of person—Married Women's Property Act - 166
See Will. 1.

—— Divorce—Assignment of alimony - 160
See Lunatic. 2.

—— Equity to a settlement - - 220
See Settlement. 1.

—— Separate estate—Election - - 606
See Election.

IDENTICAL LABEL - - - - - 681
See Trade-mark. 1.

IMPURE PERSONALTY - - - 318
See Charity.

INCOME-BEARING FUND - - - 411
See Husband and Wife. 3.

INDORSEMENT—Order of attachment - 66
See Practice. 4.

INFANT—Settled Land Act—Sale of estate 552
See Settled Land Act. 4.

INJUNCTION—Abstraction of water - 122
See Water. 2.

—— Light - - - - - - 43
See Light.

—— Solicitation of customers - - 145
See Goodwill.

—— Undertaking as to damages - - 474
See Practice. 10.

INSPECTION OF PROPERTY - - 356
See Practice. 9.

INTEREST—Compensation for taking land 614
See Artizans' Dwellings Act.

—— In land—Mortmain - - - 318
See Charity.

—— Legacy—Statute of Limitations - 676
See Limitations, Statute of. 2.

—— Proof in bankruptcy — Premium on loan from building society - - 509
See Bankruptcy. 2.

—— Purchase-money - - - 555
See Vendor and Purchaser. 2.

INTERLOCUTORY INJUNCTION—Undertaking as to damages - - - 474
See Practice. 10.

INTERLOCUTORY ORDER—Appeal - 392
See Practice. 2.

INTERROGATORIES - - - 1
See Practice. 11.

INTESTACY—Lapse - - - - - 346
See Will. 3.

INVESTMENT—Personal estate in cultivation of real - - - - - 553
See Settlement. 2.

JURISDICTION — Winding-up of foreign company - - - - - 225
See Company. 6.

LAND DRAINAGE—Charge on capital - 349
See Settled Land Act. 1.

LANDS CLAUSES ACT (8 & 9 *Vict. c.* 18), *s.* 7 —*Purchase of Land of Lunatic not so found — Conversion — Real and Personal Representatives.*] Sect. 7 of the Lands Clauses Consolidation Act, 1845, does not authorize a person of unsound mind to sell land to a company or public body who have statutory power to take it; the section only authorizes the committee of a lunatic to sell.—A public body having given notice under their statutory powers to take land belonging to a lady of unsound mind not so found, the value of the land was ascertained by two surveyors, one appointed by an uncle of the lady, who purported to act on her behalf, and the other by the public body; the sum thus ascertained was paid into Court, and the public body took possession of the land. The lady afterwards died intestate, being still of unsound mind, and her heir at law petitioned for payment of the money to him:—*Held*, that the land had never been converted into personalty, and that the heir was entitled to the money.—*Ex parte Flamank* (1 Sim. (N.S.) 260) dissented from. *In re* Tugwell - - 309

2. —— *Railway Company—Notice to treat—"House"—Company taking part of a House to take the whole — Close — Private Road—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.] A house and garden were surrounded by a wall. A gateway in the wall opened into a paddock surrounded by a high hedge of an ornamental kind. From the gateway the back road to the house passed through the paddock to a public road which ran along the far side of the paddock fence:—*Held*, that the paddock was part of the house within sect. 92 of the Lands Clauses Consolidation Act, 1845. Barnes *v.* Southsea Railway Company - - - - 536

LAPSE—Direction to settle legacy - - 346
See Will. 3.

LEASE—Covenant not to exercise trade or business
See Covenant. 1, 2. [71, 81, n.

—— Option of purchasing freehold — Real and personal representatives - - 394
See Option of Purchase.

LEGACY—Interest on—Statute of Limitations
See Limitations, Statute of. 2 [676

LEGACY DUTY—Direction to pay annuity free of duty - - - - 703
See Administration.

LETTERS—Contract by - - - 497
See Contract.

LIGHT—*Alteration of Windows—Interim Injunction—Balance of Convenience.*] The Plaintiffs being the owners of an ancient building which had numerous windows pulled it down and rebuilt it. A few of the windows in the new house included the space occupied by ancient windows, but were of larger dimensions; several others included some portion of the space occupied by ancient windows; and in some cases the spaces occupied by ancient windows were entirely built up in the new house. The Defendants commenced to build a house on the opposite side of the street, which if completed according to the plans, would materially interfere with the light coming to the Plaintiffs' windows.—On a motion for an interim injunction the Court, holding that the Plaintiffs had shewn an intention to preserve, and not to abandon, their ancient lights, and that there was a fair question of right to be tried at the hearing, and considering that the balance of convenience was in favour of granting an injunction rather than of allowing the Defendants to complete their building with an undertaking to pull it down if required to do so, granted an injunction till the hearing.—The order of Bacon, V.-C., affirmed.—*Hutchinson* v. *Copestake* (9 C. B. (N.S.) 863) and *Tapling* v. *Jones* (12 C. B. (N.S.) 826; 11 H. L. C. 290) considered. Newson *v.* Pender - **C. A.** 43

LIMITATIONS, STATUTE OF—*Annuity charged on Land and the Rents thereof—Right first accrued in* 1851—*Claim first made in* 1884—*Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *s.* 1—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 9, 10.] By an indenture executed in 1833, real estate was conveyed to trustees and their heirs, upon trust as to one moiety that immediately after the death of M. C. they should out of the moiety and the rents and profits thereof pay unto J. M., and to his heirs and assigns, or permit him or them to receive it, an annuity of £8 half-yearly. M. C. died in 1857. No payment was ever made in respect of the annuity, and the annuitant first made a claim in 1884. The Chief Clerk had certified that he was entitled to a perpetual annuity. On summons to vary the certificate:—*Held*, that, by sect. 1 of the Act 37 & 38 Vict. c. 57, no proceeding to recover any "rent," which, inasmuch as by sect. 9 the Act must be construed with the 3 & 4 Will. 4, c. 27, meant by the interpretation clause of that Act, any annuity charged upon land, could be taken after twelve years from the time when the right first accrued, therefore if there had not been any trust, those twelve years having elapsed, none of the past instalments of the annuity could be recovered, and that the effect of sect. 10 of the 37 & 38 Vict. c. 57, was that no payment of the annuity which became due before the application was made was recoverable, the remedy being only the same as if there had not been any trust. Hughes *v.* Coles - - 231

2. —— *Legacy—Interest—Delay in realization of Estate*—37 & 38 *Vict. c.* 57, *s.* 10.] The property of a testatrix who died in 1869 consisted mainly of a reversionary interest. This interest was not sold by the executors, and it did not fall into possession until 1881. In the opinion of the Court the executors had acted for the benefit of the estate in not selling the reversion:—*Held*, that legatees under the will who had waited for the payment of their legacies until after the falling in of the reversion were entitled, not merely to six years' arrears of interest, but to interest on their legacies from the expiration of one year after the death of the testatrix. *In re* Blachford. Blachford *v.* Worsley - 676

LIQUIDATOR—Appointment of - - 278
See Company. 5

—— Costs of - - - - 33
See Company. 3.

LOCAL BOARD - - - - 665
See Local Government Acts.

LOCAL GOVERNMENT ACTS—*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 48—*Local Board—Drainage—Binding Successors—Trustees—Improvident Bargain—Ultrà vires—Change of Circumstances.*] Under the Public Health Act, 1848, s. 48, the owner of land adjoining a district by deed agreed with the local board to do certain works and pay £10 a year, and the board gave him leave to drain through their drain all sewage from the property and houses then belonging to the landowner and from any houses thereafter to be erected on the property. Many more houses were afterwards erected and the urban sanitary authority (which had succeeded the local board) were under a new Act of Parliament prevented from passing as before the sewage through the drain into the Thames:—*Held*, that the deed was not *ultrà vires*, and that the board could bind their successors as to the sewage of houses not then in existence.—*Held*, that though the board were trustees for the ratepayers they had exercised their discretion, and the agreement did not appear at the time improvident, and its turning out badly for them did not affect it.—*Held*, that the law being altered so as to prevent the discharge of sewage into the Thames was no ground for setting aside the deed. Mayor of New Windsor *v.* Stovell - - - - 665

LUNATIC——*Alleged Lunatic—Order for Inquiry before Judge of the High Court—Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *s.* 4—8 & 9 *Vict. c.* 109, *s.* 19.] When an issue is directed by an order in Lunacy to try the question of the insanity of an alleged lunatic before a Judge of the High Court of Justice under the Lunacy Regulation Act, 1862, s. 4, it is not necessary to commence the proceedings by a writ of summons, the order for the issue being sufficient to give jurisdiction to the Judge. *In re* Scott - - **C. A. 116**

2. —— *Divorce—Permanent Alimony—Allowance out of Lunatic's Estate—Assignment*—20 & 21 *Vict. c.* 85, *s.* 25.] On a decree for judicial separation an order was made for payment of £60 a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, and by an order in Lunacy and Chancery the dividends of a sum of stock to which he was entitled in a Chancery suit were ordered to be carried to his account in the lunacy and £60 a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in Lunacy and in the suit to have the annuity paid to her:—*Held*, that the petition must be refused, on the ground that whether the annuity was considered as alimony or as an allowance made to the wife by the Court in Lunacy, it was not assignable. *In re* Robinson - - - - **C. A. 160**

3. —— *Pauper—Expenses of Maintenance—Right of Poor Law Guardians to recover against Estate of Lunatic after his Death—Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97), *ss.* 94, 104.] A pauper lunatic having died seised of a small amount of real estate:—*Held*, that the amount of sums paid by guardians of the union to which the pauper was chargeable (though not the union in which he died), in respect of his maintenance at a lunatic asylum, was a debt recoverable in a creditor's action against his personal and real

LUNATIC—*continued.*

representatives, though no steps to recover payment of expenses incurred in respect of such maintenance were taken by the guardians in the pauper's lifetime. *In re* Webster. Guardians of Derby Union *v.* Sharratt - - - **710**

—— Sale of land under Lands Clauses Act **309**
See Lands Clauses Act. 1.

MAINTENANCE—Lunatic - - - **710**
See Lunatic. 3.

MANSION HOUSE—Sale of—Settled Land Act
See Settled Land Act. 3. [179

METROPOLIS MANAGEMENT ACT—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 74, 75—*General Line of Buildings—House built on Vacant Land—House at Corner of Two Streets—Order of Magistrate—Reduction into Writing—Time of Service.*] The Plaintiff purchased a large piece of land abutting on a highway called the K. Road, on which were standing a public-house and several other houses fronting the highway. He pulled down the house, and made a new street through the piece of land, running into the K. Road at right angles with it, which he called D. Gardens, and sold portions of the land on each side of the new street to a builder. The builder erected a row of houses in D. Gardens, and the superintending architect of the Metropolitan Board certified the general line of buildings in D. Gardens. The Plaintiff built a row of houses fronting the K. Road, one of which was at the corner of the K. Road and D. Gardens. The side of the corner house abutting on D. Gardens projected beyond the general line of buildings in D. Gardens. The house was not built on the site of any one of the old houses in the K. Road, but on the site of part of the garden of the public-house. A magistrate's order having been obtained by the vestry for the removal of the projecting part of the corner house, the Plaintiff brought an action to restrain the vestry from interfering with his house:—*Held*, reversing the decision of Bacon, V.C., (1.) that the general line of buildings in D. Gardens extended to the K. Road; (2.) that the projecting part of the corner house was a new building and came within sect. 75 of the Metropolis Management Amendment Act, 1862, and not within sect. 74, which applies to existing buildings; and (3.) that although the corner house formed part of a row in K. Road it was also in D. Gardens, and the owner was bound to keep it within the general line of buildings of D. Gardens. The action was therefore dismissed.—*Lord Auckland* v. *Westminster District Board of Works* (Law Rep. 7 Ch. 597) distinguished.—An order was made by a magistrate under sect. 75 of the Metropolis Management Amendment Act, 1862, for pulling down the projecting part of a building within eight weeks. The order was made in the presence of the owner who was summoned, but was not reduced into writing and served on him till the day on which the eight weeks expired:—*Held*, that the order was binding; the Act being silent as to service of the order on the owner, although it requires to be in writing. Barlow *v.* Kensington Vestry **C.A. 362**

MINE—*Forest of Dean—Forfeiture of Gale—Election—Time of Application—Empty Gale.*] According to the Acts and rules regulating the working of mines in the Forest of Dean, a gale or lease is not forfeited by not being worked, unless and until the Crown claims the forfeiture. The Crown is under no obligation to claim the forfeiture. An application for a gale will not be valid, unless the gale is at the time empty. A gale is forfeited and becomes empty when notice that the Crown claims the forfeiture has been given to the galee, and an officer has been ordered to take possession, though possession is not immediately taken. The free miner who applies first after that notice has been given is entitled to the gale. JAMES *v.* YOUNG - - - - 652

MISTAKE—Misunderstanding as to contract 497
See CONTRACT.

MORTGAGE—*Foreclosure Action—Subsequent Incumbrancers—Period for Redemption.*] A first mortgagee is *primâ facie* entitled to a judgment in a foreclosure action limiting only one period for redemption, both as against subsequent incumbrancers and the mortgagor, and where there are conflicting claims as to priority between co-Defendants the practice, as settled by *Bartlett* v. *Rees* (Law Rep. 12 Eq. 395), is to grant only one period for redemption. Where, however, the defendants have put in a defence or appeared at the bar and have proved or offered to prove their incumbrances, and there is no question of priority between them, the Court will at the request of the puisne incumbrancers, but not at the request of the mortgagor, limit successive periods for redemption. A mortgagor has no right in himself to more than one period of six months to redeem. In a foreclosure action by the transferee of the first mortgagee, the statement of claim alleged that the Defendants other than the mortgagor claimed to have some charge upon the mortgaged premises subsequent to the Plaintiff's charge. None of the Defendants, including the mortgagor, put in a defence or appeared at the bar:—*Held*, that the Plaintiff was entitled to a foreclosure judgment on the pleadings, allowing one period for redemption as against all the Defendants. PLATT *v.* MENDEL - - 246

2. —— *Foreclosure Action—Mortgages of two Estates—Redemption—Apportionment of Costs of Action—Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 17.] An action was brought by a mortgagee for the foreclosure of two mortgages of two distinct estates, executed by the same mortgagor to secure two different advances. Both mortgages were executed since the Conveyancing Act, 1881, came into operation:—*Held*, that the whole of the costs of the action ought to be included in the account relating to each estate, and that the mortgagor could not redeem either estate separately without paying the whole of the costs of the action. CLAPHAM *v.* ANDREWS 679

3. —— *Sale by Mortgagor and First Mortgage—Notice of Second Mortgage—Proceeds of Sale, how to be applied.*] A mortgagor of a leasehold house, with the concurrence of the first mortgagees, who had a notice of a second equitable mortgage, sold the property. Upon completion, the balance of the purchase-money, after payment of the first mortgagees, was handed to the mortgagor. In an action by

MORTGAGE—*continued.*

the second mortgagees against the mortgagor (who did not appear) and the first mortgagees:—*Held*, that the first mortgagees were liable to the Plaintiffs to the extent of the balance of the purchase-money. WEST LONDON COMMERCIAL BANK *v.* RELIANCE PERMANENT BUILDING SOCIETY - 187

—— Charity—Mortmain - - - 318
See CHARITY.

—— Solicitor a mortgagee—Profit costs - 544
See SOLICITOR. 3.

MORTMAIN - - - - - 318
See CHARITY.

NAME OF FIRM—Trade-mark - - 681
See TRADE-MARK. 1.

NEW TRUSTEE—Power to appoint - 333
See TRUSTEE.

—— Trustee Acts - - - - 359
See TRUSTEE ACTS.

NON-RIPARIAN OWNER—Abstraction of water
See WATER. 2. [122

NOTICE—Motion for attachment - - 66
See PRACTICE. 4.

NOTICE OF TRIAL—Want of prosecution 354
See PRACTICE. 6.

NUISANCE—Percolation of water - - 588
See WATER. 1.

OPTION OF PURCHASE—*Lease—Option to purchase Fee Simple—Nature of Interest conferred on Lessee—Real and Personal Representatives.*] A lease of land contained a covenant by the lessor with the lessee, his executors, administrators, and assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs or assigns, then the lessor, his heirs or assigns, would accept £1200 for the purchase of the fee simple, and on the receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, and nearly twenty years after his death, but before the expiration of the term, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, and a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him:—*Held* (affirming the decision of Pearson, J.) that on the true construction of the covenant the option to purchase was attached to the lease and passed with it; that it consequently passed as part of the lessee's personal estate to the administrator, and that the administrator could not make a good title to the purchaser unless the next of kin of the lessee concurred in the sale.—*Green* v. *Low* (22 Beav. 625) distinguished. *In re* ADAMS AND THE KENSINGTON VESTRY - - - - - C. A. 394

PART OF HOUSE—Notice to treat - 536
See LANDS CLAUSES ACT. 2.

PARTICIPATION IN PROFITS - - 460
See PARTNERSHIP.

PARTITION SUIT—*Practice—Partition Act*, 1868 (31 & 32 *Vict. c.* 68), *s.* 8—*Sale out of Court.*] Where some of the parties beneficially interested are not *sui juris*, and the trustees have no power of sale under their trust deed, there is no jurisdiction under the Partition Act, 1868, s. 8, to order a sale out of Court. STRUGNELL *v.* STRUGNELL - - - - - - - 258

PARTNERSHIP—*Participation in Profit and Loss—Injunction—Receiver.*] Although an agreement for participation in profit and loss is *primâ facie* evidence of a partnership between the contracting parties as between themselves, yet the question of partnership must in all cases depend upon the intention of the parties as it appears on the contract.—By an agreement between the Plaintiff and the firm of H. & Co., the members of which were the two Defendants, it was agreed that for the part taken by the Plaintiff in the business, he should receive a fixed salary of £180, and in addition should receive one-eighth share of the net profits, and bear one-eighth share of the losses, as shewn by the books when balanced; and the Plaintiff agreed to advance £1500 to the business. The agreement was to be determined on four months' notice on either side. The Plaintiff had been previously a clerk of the Defendants, and he continued to perform similar duties after the execution of the agreement, and was not introduced to the customers as a member of the firm, and did not sign the name of the firm to bills. The Defendants being dissatisfied with the Plaintiff gave him notice to determine the agreement, and excluded him from the place of business. The Plaintiff brought an action for winding up the partnership, and moved for an injunction and receiver. Pearson, J., refused the motion, on the terms of the Defendants paying £1500 into Court:—*Held*, by the Court of Appeal (affirming the order of Pearson, J.), that on the true construction of this agreement the Plaintiff was in the position of a servant, and that there was no such partnership between the Plaintiff and the Defendants as to entitle the Plaintiff to an injunction or receiver. *Pawsey* v. *Armstrong* (18 Ch. D. 698) questioned. WALKER *v.* HIRSCH - - - **C. A.** 460

PAUPER—Lunatic—Maintenance - - 710
See LUNATIC. 3.

PAYMENT INTO COURT—Admissions - 251
See PRACTICE. 12.

PERMANENT IMPROVEMENTS—Capital or income - - - - - 196
See SETTLEMENT. 3.

PETITION—Winding-up—Debenture holder 278
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—— Winding-up—Inspection of documents 106
See COMPANY. 4.

POOR LAW—Maintenance of lunatic - 710
See LUNATIC. 3.

POWER—*Execution—Domicil—Marriage of Englishwoman with Foreigner—Settlement in English Form—Separate Use—Power of testamentary Disposition—Power of Appointment by "writing at any time hereafter"—Exercise by Will previously executed—Wills Act* (1 *Vict. c.* 26), *ss.* 24, 27.] On the 20th of December, 1881, prior to the marriage (solemnized in England) of a domiciled Englishwoman (a widow) with a domiciled Spaniard, real estate in England of the intended wife was vested by her in a trustee in fee, to such uses as the intended wife should by deed or will appoint, and, subject thereto, to the use of the intended wife, for her separate use. The settlement was made with the approbation of the intended husband, and the deed contained a statement that this approbation was given in consideration of a renunciation the same day executed by the intended wife of any rights which she would otherwise have acquired by her marriage in respect of the property of the intended husband according to the law of Spain. The deed also contained a declaration that it was to take effect and be construed according to the law of England. The marriage was solemnized on the next day. On the 23rd of February, 1882, the wife (being then domiciled in Spain) executed a deed-poll, in accordance with the provisions of the settlement, whereby she, in exercise of the power given to her by the settlement, appointed the real estate to the use of herself in fee for her separate use. By another deed executed the same day, to which the husband was a party, she, with the consent of the husband, appointed and conveyed, and the husband conveyed, the real estate to the use of a trustee in fee, upon trust for sale, and out of the proceeds of sale to pay certain specified debts, and, subject thereto, in trust for such person or persons as the wife "shall at any time or times hereafter by any writing or writings from time to time appoint," and, in default of any appointment and subject thereto, in trust for the wife absolutely for her separate use. Under this deed the trustee sold the property, and out of the proceeds of sale paid the specified debts, and there then remained a surplus in his hands. The wife died in June, 1882, having by a will, executed immediately after her marriage, and which purported to be made in exercise of the powers reserved to her by her marriage settlement, and of all other powers enabling her, directed, appointed, and declared that the real and personal estate over which she had any disposing power at the time of her death should be held and applied in the payment of certain legacies and annuities, and, subject thereto, she gave four-fifths of her real and personal estate, in case she should leave no children, to her husband absolutely. And she gave the remaining one-fifth of her property, charged with the before-mentioned annuities and legacies, to her brother and sisters, or to the children per stirpes of such of them as should die before her leaving children. The testatrix died without issue. The husband survived her. According to the law of Spain under such circumstances two-thirds of her property belonged to her father and mother, notwithstanding that she had left a will:—*Held*, that, whether the will was or was not a good exercise of the power reserved by the deed of February, 1882, it was a valid testamentary disposition by virtue of the limitation in default of appointment to the separate use of the testatrix; that it took effect according to English law, and that the legatees named in it (including the husband) were entitled to the benefits given to them by it.—*Semble*, that, on the authority of *Boyes* v. *Cook* (14 Ch. D. 53) the will was a valid exercise of the power of appointment given by the

POWER—*continued.*

deed of February, 1882. *In re* Hernando. Hernando *v.* Sawtell - - - - 284

2. —— *Execution—Special Power of Appointment—Appointment to Persons not Objects of Power—Direction to pay Debts of Appointor—Election.*] A testatrix had, under the will of a brother who had predeceased her, a power to appoint his property by will among his nephews and nieces and the children or child of deceased nephews and nieces. She, by her will, gave all the real and personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power of disposition, to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds (which she described as "my said trust funds") upon trust to pay costs and expenses, and to pay her debts and funeral expenses and certain pecuniary legacies, and then upon trust as to two one-fourth parts of her trust funds respectively for persons who were objects of the power; and upon trust as to the other two one-fourth-parts respectively for persons who were not objects of the power. And she declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trusts should fail, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail:—*Held*, that the testatrix had manifested an intention to exercise the power, and that as to one moiety of the brother's property the power was well exercised:—*Held*, also, that, as to the other moiety of the brother's property, the appointment was invalid, but that, by virtue of the gift "in case of the failure of any of the trusts thereinbefore declared," that moiety went to the persons to whom the first moiety was well appointed, and that, consequently, no case of election arose. *In re* Swinburne. Swinburne *v.* Pitt - - - - - 696

3. —— *Extinction — Will — Life Interest—Infant Residuary Legatee—Power of Advancement exerciseable with Consent of Life Tenant—Bankruptcy of Life Tenant—Effect of.*] A testatrix who died in 1884 gave a moiety of a trust fund to trustees upon trust to pay the income to J. C. during his life, and after his death in trust for W. J. (an infant), empowering the trustees to raise any part not exceeding one half of W. J.'s share for his advancement, subject to the consent in writing of J. C. during his life.—The trustees were desirous of exercising the power, but J. C. had become a bankrupt, and was still undischarged:—*Held*, that J. C.'s power of consenting to the advancement was not extinguished by his bankruptcy, but could not be exercised without the sanction of his trustee in bankruptcy acting under the direction of the Court of Bankruptcy. *In re* Cooper. Cooper *v.* Slight - - - 565

POWER OF SALE—Mortgage—Balance of purchase-money - - - - 187
See Mortgage. 3.

PRACTICE—*Account — Settled Account — Order for Account not directing that Settled Account shall not be disturbed.*] By the rules of a benefit society it was provided that the accounts should be audited, and that after they had been audited and signed by the auditors, the secretary and treasurer should not be answerable for any mistakes, omissions, or errors that might afterwards be proved in them. An action for an account was commenced by two shareholders, on behalf of themselves and all other the shareholders, against the secretary. No pleadings were delivered, and on a motion for a receiver being made the Defendant submitted to an order for an account of all moneys and property of the society come to his hands, without any direction as to settled accounts. The Defendant carried in a complete account, and the Plaintiffs carried in a surcharge. The Defendant then set up certain accounts which had been audited under the rules, as vouching his account for the period over which they extended. The point was brought before the Judge, who was stated to have expressed his opinion that the audited accounts must be treated as conclusive. The Plaintiffs then applied for a direction that in taking the accounts the audited accounts might be disregarded, on the ground that as the order did not save the settled accounts, they could not be attended to. The application was refused, and the Plaintiffs appealed:—*Held*, that the audited accounts ought not to be disregarded, and that the appeal must be dismissed; but the dismissal was prefaced by a statement of the opinion of the Court, that the Plaintiffs, in taking the accounts under the order, were at liberty to impeach the audited accounts for fraud. Holgate *v.* Shutt
[C. A. 111

2. —— *Appeal—Admission of Fresh Evidence — Claim in Administration Action — Order, whether interlocutory or final—Rules of Supreme Court, 1883—Order* lviii., *rr.* 4, 15.] Although an order made on a summons by a creditor in an administration action is considered as if interlocutory for the purpose of determining the time within which an appeal must be brought, for other purposes it is a final order, and therefore fresh evidence cannot be given on the appeal without the special leave of the Court. *In re* Compton. Norton *v.* Compton - - - C. A. 392

3. —— *Appeal—Expiration of Time limited for appealing—Revivor—Special Circumstances—Discretion of the Court—Rules of Supreme Court, 1883, Order* xvii., *r.* 4.] By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime then for the husband for his life, and subject thereto for such persons as should be of the wife's own kindred as she should by will appoint, and in default of appointment for such persons as would be entitled under the Statutes of Distribution, in case she had died intestate and unmarried.—The marriage was dissolved in 1871, and in 1872 the wife, in a suit instituted by her against her late husband and the trustees of the settlement, obtained a decree that she was absolutely entitled to the property comprised in the settlement.—By her will, dated in 1877, the wife disposed of the property as if it was her own absolutely, and died in 1881,

PRACTICE—*continued.*

in the lifetime of her late husband:—*Held*, in the absence of special circumstances, that the next of kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings therein for the mere purpose of appealing against the decree of 1872. Fussell *v.* Dowding 237

4. —— *Attachment—Rules of Supreme Court, 1883, Order XLI., r. 5—Indorsement on Order—Form of Notice of Motion for Attachment—Order LII., r. 4.*] By order of the 28th of February, 1884, the Defendant was directed to pay a sum into Court by the 13th of March. This order not having been served before the 13th of March, an order was made on the 3rd of April enlarging the time until four days after service of the two orders. The Plaintiff served the two orders, indorsing on the former the notice given in Order I. of the 7th of January, 1870, but putting no indorsement on the latter. The money not having been paid in, the Plaintiff moved for an attachment "for your default in obeying the orders made herein on the 28th of February last and the 3rd of April last," supporting it by an affidavit that the Defendant had not borrowed the order for the purpose of paying in the money, nor given notice of having paid in the money:—*Held*, that as the second order did not require the Defendant to do any act, but only extended the time for doing the act mentioned in the first order, it was sufficient to indorse the first order only:—*Held*, also, that the indorsement was sufficient in form, for that although not in the words of the indorsement given in the rules of 1883, Order XLI., rule 5, it was to the same effect:—*Held*, also, that having regard to the nature of the orders, a notice of motion to attach "for default in obeying" them sufficiently stated the grounds of the application within the meaning of Order LII., rule 4:—*Held*, also, that though the affidavit in support of the application would probably have been held insufficient to support an attachment, if the motion had been heard on affidavit of service, the defect was cured by the Defendant's appearing and resisting the application on other grounds. Treherne *v.* Dale - - - C. A. 66

5. —— *Chambers—Chief Clerk's Certificate—Application to vary—Rules of Supreme Court, 1883, Order LV., rr. 70, 71.*] On an application upon the further consideration of an action for an extension of the time, under rule 71 of Order LV., for applying to vary a finding in a Chief Clerk's certificate:—*Held*, that the applicant should take out a summons for the purpose. *In re* Dove. Bousfield *v.* Dove - - - - 687

6. —— *Dismissal for want of Prosecution—Notice of Trial given, but Trial not entered—Rules of Supreme Court, 1883, Order XXXVI., rr. 12, 16.*] A Plaintiff gave notice of trial (in Middlesex) within the six weeks limited by rule 12 of Order XXXVI.; but did not, as required by rule 16, enter the trial within six days after the notice of trial was given. The trial not having been entered:—*Held*, that the Defendant was entitled to move to dismiss for want of prosecution, and an order dismissing the action was accordingly made. Crick *v.* Hewlett - - - 354

7. —— *District Registry.—Administration Action—Taxation—Taxing Officer—District Registrar—Rules of the Supreme Court, 1883, Order XXXV., r. 4; Order LXV., r. 27, sub-s. 43—Supreme Court Funds Rules, 1884, rr. 3, 11, 12, 98, 111.*] The Court can, in its discretion, order the taxation of costs in an administration action commenced and prosecuted in a District Registry to be made by the District Registrar.—The term "Taxing Officer" in rules 3, 11, and 12 of Supreme Court Funds Rules, 1884, these rules being read in conjunction with Order LXV., rule 27, sub-s. 43 of Rules of Supreme Court, 1883, includes "District Registrar," where the Court has directed taxation to be made by that officer, and the Paymaster is bound to act on the certificate of taxation of a District Registrar, when the Court, in the exercise of its discretion, has directed taxation in the District Registry.—The Court, however, following *Day* v. *Whittaker* (6 Ch. D. 734), will not, except under very special circumstances, direct the costs of an action commenced in a District Registry to be taxed otherwise than by a Taxing Master of the Chancery Division. *In re* Wilson. Wilson *v.* Alltree - 242

8. —— *Evidence—Examination of Witnesses Abroad—Rules of Supreme Court, 1883, Order XXXVII., r. 5.*] Where it is sought to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must shew clearly that he cannot bring him to this country to be examined at the trial. Lawson *v.* Vacuum Brake Company [C. A. 137

9. —— *Inspection of Property—Interlocutory Order—Authority to dig up Soil—Rules of Supreme Court, 1883, Order L., r. 3.*] Under rule 3 of Order L. the Court has power to make an interlocutory order before trial, giving liberty to a plaintiff to enter upon land belonging to the defendant, and to excavate the soil thereof for the purposes of inspection.—The decision in *Ennor* v. *Barwell* (1 D. F. & J. 529) has no application to this rule. Lumb *v.* Beaumont - - - - 356

10. —— *Interlocutory Injunction—Undertaking as to Damages.*] *Per* Baggallay, Cotton, and Lindley, L.JJ., where an interlocutory injunction has been granted on the usual undertaking as to damages, if it afterwards is established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, though the plaintiff was not guilty of misrepresentation, suppression, or other default in obtaining the injunction.—*Dictum* of Jessel, M.R., in *Smith* v. *Day* (21 Ch. D. 421) dissented from. Griffith *v.* Blake - - - - C. A. 474

11. —— *Interrogatories—Discovery—Attempt to falsify Claim for Privilege—Affidavit of Documents—Rules of Court, 1875, Order XXXI., rr. 9, 10, 11, 23—Rules of Supreme Court, 1883, Order XXXI., rr. 10, 11, 14, 24.*] Where in an answer to interrogatories the party interrogated declines to give certain information on the ground of professional privilege, and the privilege is properly claimed in law, the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in docu-

PRACTICE—*continued.*

ments so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated.—The mere existence of a reasonable suspicion which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified.—The duty of the Court with reference to answers to interrogatories is now regulated by Order xxxi., rules 10, 11, and limited to considering the sufficiency or insufficiency of the answer, *i.e.*, whether the party interrogated has answered that which he has no excuse for not answering—and only in the case of insufficiency can it require a further answer:—*Semble* (*per* Bowen, L.J.), that an embarrassing answer to interrogatories may be dealt with as insufficient.—A party interrogated may, on a question of sufficiency, refer to his whole affidavit in answer to interrogatories, and is not restricted to the passages dealing with any particular interrogatory, and all embarrassment to the interrogating party is now obviated by the provisions of Order xxxi., rule 24; but he must not endeavour to import into an admission matter which has no connection with the matter admitted.—A waiver of privilege in respect of some out of a larger number of documents for all of which privilege was originally claimed does not preclude the party from still asserting his claim of privilege for the rest.—Although *primâ facie* privilege cannot be claimed for copies of or extracts from public records or documents which are *publici juris*, a collection of such copies or extracts will be privileged when it has been made or obtained by the professional advisers of a party for his defence to the action, and is the result of the professional knowledge, research, and skill of those advisers.—The Defendant K. in his answer to interrogatories objected to disclose certain information asked for by the Plaintiff L. on the ground of professional privilege, which the Court held properly claimed in law. L. sought by reference to certain admissions in the answer itself, and from documents referred to in the interrogatories and answer, as well as from documents scheduled to K.'s affidavit of documents, to shew that the information sought was obtained under circumstances which negatived the claim of privilege, and sought a further answer:—*Held* (affirming Bacon, V.C.), that no further answer should be required, as the admissions in the answer and in the documents referred to therein only raised a case of suspicion at the most, which might be capable of explanation if K. were at liberty to make an affidavit.—The Court declined to decide how far, under the present practice, reference could be made, as against the interrogated party, to any document in possession not referred to in his answer, but only scheduled to his affidavit of documents.—K.'s solicitors had for the purposes of K.'s defence in the action procured copies of and extracts from certain entries in public registers, and also photographs of certain tombstones and houses to be taken, for which K. in his affidavit of documents claimed protection:—*Held* (affirming Bacon, V.C.) that although mere copies of unprivileged documents were themselves unprivileged, the whole collection being the result of the professional knowledge, skill, and research of his solicitors, must be privileged—any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case. Lyell *v.* Kennedy - **C. A. 1**

12. —— *Payment into Court—Admission—Evidence.*] Trust funds may be ordered to be brought into Court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money. Hampden *v.* Wallis - - - **251**

13. —— *Transfer to County Court—Plaintiff failing to proceed—Jurisdiction of Superior Court—County Courts Act*, 1867, *ss.* 7, 8, 10—*County Court Rules*, 1875, *Order xx. r.* 1—*Judicature Act*, 1873, *s.* 67.] Where an order has been made for the transfer of a Chancery action to a County Court under sect. 8 of the County Courts Act, 1867, the Superior Court retains its jurisdiction in the action until the transfer has been completed by all necessary steps being taken for that purpose. David *v.* Howe - - - **533**

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See ELECTION.

—— Income-bearing fund - - - 411
See HUSBAND AND WIFE. 3.

RETAINER — *Administration — Real Estate — Retainer by Heir-at-law—3 & 4 Will. 4, c. 104—Hinde Palmer's Act* (32 & 33 *Vict. c.* 46).] An heir at-law or devisee has no right of retainer, either out of the proceeds of sale of real estate, or out of rents received by him, for a debt due to him on simple contract from the testator or intestate. Such right of retainer arises only where the creditor is a person liable to be sued at law for debts of the same nature owing by the testator or intestate, so that other creditors might gain priority over him if he had not a right to retain, and therefore an heir or devisee, as he cannot be sued at law for simple contract debts, has no right of retainer for them.—*Semble*, that notwithstanding Hinde Palmer's Act (32 & 33 Vict. c. 46), an heir-at-law or devisee where the estates are not charged with debts, may retain a debt to which he is entitled by specialty in which the heirs are bound.—*Ferguson* v. *Gibson* (Law Rep. 14 Eq. 379) considered. *In re* ILLIDGE. DAVIDSON *v* ILLIDGE - - - C. A. 478

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SETTLED LAND ACT, 1882—(45 & 46 *Vict. c.* 38), *ss.* 21, 25, 26—*Incumbrances—Payment of—Land Drainage Charges.*] Where a tenant for life of settled land has, prior to the Settled Land Act, 1882, created charges for land drainage and improvements under the Land Improvement Act, 1864, and other Acts, he will not be entitled under the Settled Land Act to have those charges paid out of the capital of the settled land.—The 26th section of the Settled Land Act, 1882, is prospective, not retrospective.—The term "incumbrances affecting the inheritance of the settled land" in sect. 21, sub-sect. 2, must be taken as meaning incumbrances in the ordinary sense, such as mortgages, portions, &c., and not terminable charges such as those which affect the tenant for life, rather than the remainderman. *In re* KNATCHBULL'S SETTLED ESTATE - - 349

SETTLED LAND ACT, 1882—*continued.*

2. —— (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 1—*Settlement—Definition—Original and derivative Settlements—Appointment of Trustees for Purposes of Act.*] When a complete settlement of land has been made, and derivative settlements have been afterwards made by persons who take interests (not yet in possession) under the original settlement, the original settlement alone is the settlement for the purposes of the Settled Land Act.—The Court will not in general appoint as trustees of a settlement for the purposes of the Act two persons who are near relatives to each other. There ought to be two independent trustees. *In re* Knowles' Settled Estates 707

3. —— *Tenant for Life—Sale—Mansion-house—Heirlooms—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 15, 37—*Practice—Service.*] A testator bequeathed to his trustees certain articles as heirlooms to be annexed to his mansion-house and held in trust for the person for the time being entitled to the mansion-house under the equitable limitations thereinafter contained; and he devised his mansion-house and estate, comprising about 360 acres, to the trustees upon trust for his son for life, with equitable remainders over in strict settlement for the benefit of the son's issue: and the testator directed that his mansion-house and certain lands thereto belonging, comprising about thirty acres, and described on a plan indorsed on the will, should be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms should at all times be kept in the mansion-house. Powers were given to the trustees to let, sell, or exchange any part of the settled estate except the mansion-house and lands described on the plan.—The testator's son, the tenant for life, being desirous of selling the whole estate under the powers of the Settled Land Act, 1882, applied to the Court under sect. 15 for leave to sell the excepted mansion-house and lands, on the ground that, owing to ill-health and permanent residence elsewhere, he was unable to reside in the mansion-house, and also that inasmuch as the estate was in proximity to a large town, the bulk of the estate could not be sold advantageously without the mansion-house and adjoining lands. The summons did not ask for the sale of or contain any reference to the heirlooms:—*Held*, that, on the evidence, the case was a proper one for a sale of the mansion-house and adjoining lands, but that leave for sale would not be granted without some direction as to the disposal of the heirlooms.—The summons was then amended, with the consent of the trustees, by asking for leave to sell the heirlooms also, under sect. 37 of the Settled Land Act, 1882, by reference to an inventory verified by affidavit, whereupon an order was made for the sale of the heirlooms with liberty for the tenant for life to bid at such sale.—Service of the summons on the children of the tenant for life was dispensed with, their interests being sufficiently represented by the trustees, who had been served. *In re* Brown's Will - 179

4. —— *Trustees — Infant — Sale out of Court—Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 59, 60.] In appointing trustees under the Settled Land Act, 1882, to sell an infant's estate (ss. 3, 59, 60), the Court has jurisdiction to authorize the sale to be made out of Court. *In re* Price. Leighton *v.* Price - - - 552

SETTLEMENT—*Equity to a Settlement—Settlement of whole Fund.*] A husband entitled to leaseholds in right of his wife, deserted her and their children, and for eight years contributed nothing towards her or their support, except the rents of the leaseholds. During the desertion the leaseholds were sold by the wife for £250 to a purchaser, who expended the greater part of the proceeds upon the maintenance of the wife and children. In an action by the husband against the wife and the purchaser to set aside the sale and recover the leaseholds or the proceeds:—*Held*, that, under her equity to a settlement, the wife was entitled to have the entire proceeds of the sale secured to herself, and such proceeds having practically been expended for her benefit, the action must be dismissed with costs. Boxall *v.* Boxall - - - - - 220

2. —— *Investment of Personal Estate to cultivate Real Estate.*] The trustees of real and residuary personal estate devised and bequeathed in trust for A. for life, with remainder to his children, who were infants (there being no investment clause in the will) were authorized to advance to the tenant for life part of the residuary personal estate for the purpose of stocking and cultivating a farm forming part of the real estate, on evidence that the outlay would be to the advantage of the infant remaindermen. *In re* Household. Household *v.* Household - - - - - 553

3. —— *Permanent Improvements—Tenant for Life—Trusts of Minority Term—Option to Trustees to pay Charges out of Income or Capital—Incidence of Charges paid for out of Income during Minority.*] By a deed, executed two years before his will, a testator devised estates in Glamorganshire, which comprised a canal, harbour and docks at Cardiff, and also estates in the counties of Bedford, Herts, and Durham, to A., B., and C., upon trust out of rents and profits and sums to be raised by sale or mortgage, to pay expenses, salaries, mortgage debts, and the residue to the settlor. He empowered the trustees to enlarge, improve and make additional works at Cardiff, and to manage the estates, with powers of leasing, sale and mortgage.—By his will, dated two months before the birth of his first son, the testator devised the Glamorganshire estates (except Cardiff Castle, park, and lands adjoining) to B. and C. and their heirs for a term of 1500 years, and subject thereto to the use of his first son for life, remainder to his first and other sons in tail male. The trusts of the 1500 years term were declared to be, after payment out of income of certain annuities, of a specified sum for certain repairs, "by mortgaging or otherwise disposing of the term . . . or by, with and out of the rents, issues and profits of the same hereditaments . . . or by one . . . or all of the aforesaid ways and means, or by any other reasonable ways and means" to raise moneys sufficient for the above purposes, and with the moneys to arise from the sale of the estates in Bedford, Herts, and Durham, to satisfy the trusts of such sale. The trustees of the term

SETTLEMENT—*continued.*
were empowered to manage and improve the hereditaments comprised in the term in the same manner as the trustees of the deed.—Testator then directed that, during the minority of a tenant for life of the Glamorganshire estates, D. and A. should enter into possession and receipt of the rents and profits of the same hereditaments, and thereout keep down the interest on mortgages, and maintain mansion-houses and grounds, and pay the surplus to the trustees of the 1500 years term for the purposes thereof, and "subject thereto, and after the trusts of the said term of 1500 years shall be fully performed or satisfied" apply any annual sum they might think proper for the maintenance of the minor, and invest the surplus and accumulate the income for his benefit on attaining majority.—The trusts of the proceeds of the sale of the Bedford, Herts, and Durham estates were declared to be: 1. to pay debts, including mortgage debts on the Glamorganshire estates; and 2. to purchase lands to be settled as before.—Six months after the birth of his first son, testator died, and during the minority the trustees of the 1500 years term laid out upwards of £1,000,000 in enlarging and improving the canal, docks, and harbour, and in other works. This sum was largely paid out of income:—*Held*, that the expenditure was a charge on the corpus of the estates comprised in the term. *In re* Marquess of Bute. Marquess of Bute *v.* Ryder - 196

4. —— *Trust for Sale—Trust exercisable without Consent of Cestuis que Trust.*] Real property was vested in trustees upon trust at the request of A. and B. and the survivor, and after their death at discretion, to sell and hold the proceeds upon trust for A. and B. successively for life, and then for the children equally. After the deaths of A. and B. there were three adult children:—*Held*, that the trust for sale was not spent, but was exercisable by the trustees without the concurrence of the beneficiaries. *In re* Tweedie and Miles - - - - - - - 315

—— Derivative—Settled Land Act - 707
See Settled Land Act. 2.

—— Power of appointing new trustees - 333
See Trustee.

SHARES—Purchase by company of its own shares
See Company. 1. [268

SIMPLE CONTRACT DEBT—Retainer by heir-at-law - - - - - - 478
See Retainer.

SOLICITOR—*Bill of Costs—Costs of Taxation—Offer by Solicitor to reduce the Amount—Certifying special Circumstances—6 & 7 Vict. c. 73, s. 37.*] C., a solicitor, sent in to executors a bill of costs for £83, writing at the foot, "say £78," and the £78 was paid. The residuary legatee obtained an order to tax the bill, which was taxed at £66, being more than five-sixths of £78, but less than five-sixths of £83. The residuary legatee objected to certain items as excessive, and the Taxing Mafter considered that they were excessive; but held, that, as the executors had authorized them and admitted their liability to pay them, the residuary legatee could not have them reduced:—*Held*, by Chitty, J., that the Taxing Master was right in allowing these items; that the bill must be treated as a bill for £78, from which less than one-sixth had been taxed off, and that the solicitor was entitled to the costs of the reference.—P., a solicitor, delivered a bill for £362, but stated that he would only claim £320, and the £320 only was entered in the cash account which he delivered to his clients. The clients obtained an order for taxation. The Taxing Master taxed the bill at £280, being more than five-sixths of £320, but less than five-sixths of £362, and certified that he had allowed the solicitor the costs of the reference, as he considered that since he had never claimed more than £320, the difference of £42 between this sum and the amount of the whole bill, ought to be deducted from the sums taxed off, thus reducing them to £40, which was less than a sixth of the sum he had claimed:—*Held*, by Pearson, J., that the solicitor must pay the costs of the reference.—*Held*, on appeal, that in *C.'s Case*, the bill delivered, within the meaning of 6 & 7 Vict. c. 73, s. 37, was a bill for £83, and that, as more than one-sixth had been taxed off, the solicitor must, according to that section, pay the costs of the reference; the case not coming within the proviso giving the Court a discretion where special circumstances are certified.—*Held*, in *P.'s Case*, that special circumstances were certified, so as to give the Court a discretion as to the costs of the reference, but that the special circumstances were not such as to induce the Court to depart from the general rule that the costs of the reference should follow the event of the taxation, and that in this case also, more than one-sixth having been taxed off the £362, the solicitor must pay the costs of the reference. *In re* Carthew. *In re* Paull - - - - **C. A. 485**

2. —— *Bill of Costs—Executor—Direction as to Professional Charges—Construction.*] A testatrix by her will appointed her solicitor (who prepared her will) one of her two executors and trustees, and, stating that it was her desire that he should continue to act as solicitor in relation to her property and affairs, and should "make the usual professional charges," expressly directed that notwithstanding his acceptance of the office of trustee and executor he should be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time, and trouble given and bestowed by him in or about the execution of the trusts and powers of the will, and the management and administration of the trust estate, real or personal, as if he, not being himself a trustee or executor, were employed by the trustee or executor. Under this direction the solicitor-executor delivered bills of costs which included charges for all business done by him, whether such business was strictly professional or could have been transacted by a lay executor without the assistance of a solicitor:—*Held*, that all items which were not of a strictly professional character ought to be disallowed.—*In re Ames* (25 Ch. D. 72) distinguished. *In re* Chapple. Newton *v.* Chapman - - 584

3. —— *Bill of Costs—Taxation—Mortgage—Mortgagor and Mortgagee—Trustee—Profit Costs.*] Where one of a body of mortgagees is a solicitor and acts as such in enforcing the mortgage

SOLICITOR—*continued.*
security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not.—If in such a case the mortgagor, in applying for an order to tax the bill of the solicitor-mortgagee, desires to raise the objection to profit costs, he should state his objection in his petition for taxation. *In re* DONALDSON 544

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TRADE-MARK—*Registration—Distinctive Letters—Name of Firm—Fancy Words not in Common Use—Identical Label—Power of Comptroller—Sanction of Court—Refusal to register.*] An application was made for an order upon the Comptroller of Trade-marks to register a mark having the words "Price's Patent Candle Company" in common letters round the upper border and "National Sperm" in the centre, with the address of the company round the lower border. The Comptroller refused to register the mark, on the ground that there was a mark so nearly resembling this, already on the register, as to be calculated to deceive, and also because it was not a distinctive label within the terms of the Patents Act, 1883:—*Held*, that the name of the firm printed in common letters not being distinctive, and the words "National Sperm" not being fancy words "not in common use," the label did not fulfil the requirements of the Patents, Designs, and Trade-marks Act, 1883, s. 64:—*Held*, also, that the Comptroller would be justified in refusing to register a label so nearly resembling another label already on the register as to be calculated to deceive, until the opinion of the Court should have been obtained authorizing him to do so. *In re* PRICE'S PATENT CANDLE COMPANY - 681

2. —— *Registration—Length of adverse User—Fraudulent Commencement—Continuing Misrepresentation—Foreign Proprietor.*] Mere length of adverse user will not of itself make a mark which was originally a trade-mark publici juris, where such user was originally fraudulent and is still calculated to deceive, but it throws upon the trader claiming an exclusive right to the mark the onus of proving such original fraud and continuing misrepresentation, and the longer the user the stronger must be the evidence.—Upon this principle an application to register under the Trade-marks Acts in combination with the name of the applicants, a foreign trade-mark which had been used by the applicants and by thirty other firms in this country in combination with their own respective names or with some device for fifty years, was refused upon the opposition of the foreign proprietor of the mark who had only recently discovered such user. The owners of ironworks at Leufsta, in Sweden, had, in 1718, registered in Sweden, as a trade-mark, the letter L within a circle (called in the trade the Hoop L), and their iron so marked had acquired a high reputation, particularly for manufacture into blister steel. By Swedish law all bar iron must be stamped with a duly registered mark before it is exported, and, from the year 1835 the Leufsta iron was exported to England marked with the hoop L in combination either with the name of the English consignee, or with the word "Leufsta," or with both. In 1878 the Hoop L was registered in England by the Leufsta owners as a trade-mark both alone and in combination with the word "Leufsta."—In 1882 the B. Company, a firm of English steel manufacturers, applied to register under the Trade-marks Acts the Hoop L in combination with the words "B. Company, Warranted," and produced evidence to shew that for fifty years they and thirty other firms had used the Hoop L in combination with a name or with a device upon all blister steel manufactured from Swedish iron, whether Leufsta iron or not, cutting off from inferior iron its distinctive stamp and substituting the Hoop L.—The Leufsta owners opposed the application, and proved that this adverse user was not discovered by them until 1881:—*Held*, that the Hoop L mark had not become publici juris, and that the application to register it must be dismissed with costs. *In re* HEATON'S TRADE-MARK - 570

3. —— *Registration—Rectification of Register—Patents, Designs, and Trade-Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 76, 90, 113.] The right to the exclusive use of a trade-mark, after the expiration of five years from the date of registration, given by the Trade-marks Act, 1883, s. 76, is subject to and controlled by sect. 90, and therefore any person who considers himself aggrieved by any entry made in the register without sufficient cause is not precluded by the expiration of five years from the date of such registration from shewing that the mark ought not to have been registered. *In re* LLOYD AND SONS' TRADE-MARK. LLOYD *v.* BOTTOMLEY 646

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—— Into joint names - - - 341
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TRUST—For sale—Consent of cestui que trust
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—— Transfer into joint names - - 341
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TRUSTEE—*Power of appointing new Trustees—Retirement of Trustee—Validity of Appointment by continuing Trustee—Exercise of Power after Judgment for Administration of Trusts—Approval of Court—Solicitor of continuing Trustee.*] When a power of appointing new trustees authorizes the continuing trustee or trustees to appoint a new trustee or trustees in the place of a trustee or trustees becoming unwilling to act, an appointment by a sole continuing trustee, in the place of a trustee who desires to retire, is valid; it is not necessary that the retiring trustee should join in making the appointment.—*In re Glenny and Hartley* (25 Ch. D. 611) commented on, and dicta of Bacon, V.C., dissented from.—*Travis* v. *Illingworth* (2 Dr. & Sm. 344) approved and followed.—On the retirement of one of two trustees of a will, the continuing trustee, who was the solicitor to the trustees, appointed his son, who was his partner in his business, to be a new trustee. The trusts of the will were being administered by the Court:—*Held*, that, without any reference to the personal fitness of the son, by reason of his position the appointment was one which the Court ought not to approve, though

TRUSTEE—*continued.*

it would not have been invalid if the Court had not been administering the trusts. *In re* Norris. Allen *v.* Norris - - - - 333

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—— Investment - - - - 553
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—— Settled Land Act - - 552, 707
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—— Solicitor—Profit costs - - - 544
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—— Trust for sale—Consent of cestui que trust [315
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TRUSTEE ACTS—*Appointment of New Trustees—Vesting Order—"Seised jointly"—Coparceners—Trustee Act,* 1850 (13 *&* 14 *Vict. c.* 60), *s.* 10.] The words "seised jointly" in sect. 10 of the Trustee Act, 1850, are not limited strictly to a legal joint tenancy, but are used in the widest sense, and they include the case of land vested in coparceners, one of whom is out of the jurisdiction of the Court.—*In re Templer's Trusts* (4 N. R. 494) and *McMurray* v. *Spicer* (Law Rep. 5 Eq. 527) considered. *In re* Greenwood's Trusts - - - - - - 359

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UNITY OF PERSON—Husband and wife 166
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See Metropolis Management Act.

VENDOR AND PURCHASER—*Conditions of Sale—Right to rescind.*] Property was purchased under a condition that "if the purchaser shall take any objection or make any requisition" as to the title which the vendor "is unable or unwilling to remove or comply with," the vendor, might rescind the contract. A deposit was paid; and requisitions having been sent in, with several of which the vendor, for reasons stated, "declined to comply," the purchasers insisted on their requisitions, and the vendor, after an interval, served the purchasers with notice to rescind.—The purchasers, in reply, denied the vendor's right to rescind, but said they would withdraw the requisitions, and were willing to complete:—*Held*, that the contract was rescinded, and that the purchasers were not entitled to have a conveyance on payment of the balance of the purchase-money. *In re* Dames and Wood - 172

2. —— *Conditions of Sale—Right to rescind—Purchase-money—Deposit—Separate Account—Interest.*] On a sale of a freehold house by auction one of the conditions of sale provided that "all objections and requisitions in respect of the title, or the abstract, or particulars, or anything appearing therein respectively shall be sent to the vendors' solicitors within fourteen days from the delivery of the abstract, and all objections and requisitions not sent in within that time shall be considered to be waived. If any objection or requisition shall be made and insisted on, which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty by notice in writing to rescind the sale." The purchaser accepted the vendors' title as shewn by the abstract and sent them a draft conveyance for approval. The vendors then required that the conveyance should be taken subject to certain "covenants, conditions, and restrictions," the nature of which they did not explain, but which, they alleged, were contained in a deed recited in an abstracted deed forming the commencement of title. As the abstract did not shew the existence of any such covenants, conditions, or restrictions, and as the conveyance to the vendors' immediate predecessor in title did not in any way refer to them, the purchaser declined to take a conveyance subject to them without, at all events, being first informed of their nature, whereupon the vendors wrote purporting to rescind the contract:—*Held*, upon a summons by the purchaser under the Vendor and Purchaser Act, 1874, that the vendors had no power to rescind, and that the purchaser was entitled to a conveyance without the insertion of the words required by the vendors.—Another condition of sale provided for payment of a deposit and for the completion of the purchase on a certain day; and that "if from any cause whatever," the purchase should not be completed on that day the purchaser should pay interest at 5 per cent. per annum on the remainder of his purchase-money until completion. After receiving the vendors' notice of rescission the purchaser, on the day fixed for completion, placed the balance of her purchase-money to a separate account on deposit with a bank at 2½ per cent. interest, and gave notice of the deposit to the vendors:—*Held*, that the purchaser could not, under the circumstances, be required to pay, on actual completion, higher interest than that allowed by the bank. *In re* Monckton and Gilzean - - - 555

3. —— *Conveyance—Sale of Real Estate by Trustees—Requisition by Purchasers that all the Trustees should attend to receive Purchase-moneys, or direct payment into a Bank.*] Trustees of real estate sold parts of it to the Metropolitan Board of Works, and they sent in a requisition that the vendors should attend personally to receive the purchase-moneys, or direct the moneys to be paid to their joint account at a bank. One or more of the trustees resided in the country. On summonses taken out under the Vendor and Purchaser Act, 1874, by the board:—*Held*, that the requisition must be complied with by the trustees, and that they must pay the costs of the application.—*In re Bellamy and Metropolitan Board of Works* (24 Ch. D. 387) followed. *In re* Flower and Metropolitan Board of Works. *In re* Flower and Same - - - - 592

4. —— *Forfeiture of Deposit—Purchaser's Failure to complete.*] On a sale of real estate the purchaser paid £500, which was stated in the contract to be paid "as a deposit, and in part

VENDOR AND PURCHASER—*continued.*
payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to re-sell and to recover any deficiency in price as liquidated damages. The purchaser was not ready with his purchase-money, and, after repeated delays, the vendor re-sold the property for the same price.—The original purchaser having brought an action for specific performance, it was held by the Court of Appeal, affirming the decision of Kay, J., that the purchaser had lost by his delay his right to enforce specific performance:—*Held*, also, that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the Plaintiff, having failed to perform his contract within a reasonable time, had no right to a return of the deposit.—*Palmer* v. *Temple* (9 Ad. & E. 508) distinguished. Howe *v.* Smith C. A. 89

—— Misrepresentation - - - 424
See False Representation.

—— Title—Trust for sale - - - 315
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VERDICT—Compensation for taking land 614
See Artizans Dwellings Act.

VESTING ORDER - - - - 359
See Trustee Acts.

WANT OF PROSECUTION—Motion to dismiss
See Practice. 6. [354

WATER—*Nuisance—Percolation of Water.*] Defendant allowed water to collect in his cellar and to percolate into the Plaintiff's cellar.—*Held*, that this was a wrong within the decision of *Rylands* v. *Fletcher* (Law Rep. 3 H. L. 330), and that the Plaintiff was entitled to damages.—*Ballard* v. *Tomlinson* (26 Ch. D. 194) dissented from. Snow *v.* Whitehead - - - - 588

2. —— *Riparian Owner — Abstraction of Water by non-riparian Owner—Absence of Damage —Right of Action—Injunction—Rights of riparian Owner in artificial Stream.*] The owner of land not abutting on a river with the license of a riparian owner took water from the river, and after using it for cooling certain apparatus returned it to the river unpolluted and undiminished:—*Held* (affirming the decision of Pollock, B.), that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken.—Observations on the rights which can be acquired by a riparian owner in an artificial stream. Kensit *v.* Great Eastern Railway Company - - C. A. 122

WILL—*Construction—Gift to Husband and Wife and Third Person—Unity of Person of Husband and Wife—Separate Use—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 5.] A testatrix, by her will, dated in 1880, gave her residuary personal estate "to C. J. M., and J. H. and E. his wife," to and for their own use and benefit absolutely, and appointed C. J. M., and J. H. and E. H. his wife, her executors.—The testatrix died in 1883, after the commencement of the Married Women's Property Act, 1882. J. H. and E. H. were married in 1864.—*Held* (reversing the decision of Chitty, J.), that as the will was made before the Married Women's Property Act came into operation, it must be construed in accordance with the law at that time, and that the three residuary legatees were entitled to the personal estate as joint tenants, C. J. M. taking one moiety, and J. H. and E. H., his wife, taking the other moiety between them, J. H. in his own right, and his wife for her separate use. How the Court would have construed the gift if the will had been made after the Married Women's Property Act, 1882, came into operation, *quære*. *In re* March. Mander *v.* Harris
[C. A. 166

2. —— *Construction—Heirlooms—Reference to deed of Entail—Non-existence of Deed—Non-failure of Gift.*] Testator bequeathed a collection of books, manuscripts, and pictures to his executors to hold as heirlooms, and suffer the same to be used and enjoyed by the person who for the time being under the limitations of "a certain deed of entail bearing date the day of shall be entitled to the possession of" M. House.—At the testator's death there was no such deed of entail as described in the will in existence, and the testator was entitled to the house absolutely in fee simple:—*Held*, that the collection belonged to the heir-at-law of the testator, as the person entitled in possession to M. House. *In re* Marquess of Bute. Marquess of Bute *v.* Ryder - - - - 196

3. —— *Construction — Lapse — Intestacy — Bequest of Share of Residue to a Woman—Direction for Settlement of Share—Death of Legatee in Testator's Lifetime.*] A testator bequeathed the residue of his personal estate to trustees, upon trust for a nephew and three nieces by name, equally between them. And he declared that his trustees should retain the share of each of his nieces, upon trust to pay the income to her during life, for her separate use without power of anticipation, and after her decease, as to the capital thereof, upon trust as she should by will appoint, and in default of appointment, upon trust for her child or children, sons at twenty-one and daughters at twenty-one or marriage, equally between them if more than one. One of the nieces married, and died before the testator, leaving an infant daughter her surviving:—*Held*, that the share of the deceased niece had lapsed, and that there was an intestacy in respect of it.—*Stewart* v. *Jones* (4 De G. & J. 532) followed.—*Unsworth* v. *Speakman* (4 Ch. D. 620) disapproved. *In re* Roberts. Tarleton *v.* Bruton - - - - 346

4. —— *Construction — Precatory Trust.*] A testator gave all his real and personal estate unto and to the absolute use of his wife, her heirs, executors, administrators, and assigns, "in full confidence that she would do what was right as to the disposal thereof between his children, either in her lifetime or by will after her decease":—*Held* (affirming the decision of Pearson, J.), that under these words the widow took an absolute interest in the property, unfettered by any trust in favour of the children. *In re* Adams and the Kensington Vestry - 394

WILL—*continued.*

5. —— *Construction of—Will speaking from Death—Devise of Cottage and Land at S.—"In their present state"—Gift of Residue of Real and Personal Estate—Subsequent Contract to purchase Mansion and Land at S.—Wills Act*, 1837 (1 *Vict.* c. 27), *s.* 24.] Testator devised to his son G. for life his cottage and land at S. on a certain special condition that the trees should not be cut down or removed, and that the boundary fences and the plantations, &c., should be preserved "in their present state," and after the death of G., to his son, with remainders over, and as to all other his freehold estate and the residue of his personal estate he gave the same to trustees upon certain trusts. After the date of the will the testator contracted to purchase from his son G. a mansion and about ten acres of land situate at S., but the contract was not completed at the time of his death:—*Held*, that the testator had not with sufficient clearness shewn, within the meaning of the 24th section of the Wills Act, 1837 (1 Vict. c. 26), a contrary intention, and therefore the property contracted for passed to his son G.—The words "in their present state" must be taken to refer to the period of death, and did not indicate an intention that after-acquired property should not pass, with sufficient clearness to amount to the contrary intention which the statute requires.—Though the words "my cottage and all my land" were not apt in a devise of a mansion and lands, yet the word "land" was quite large enough to include them. *In re* Portal and Lamb - - - - - - 600

WILL—*continued.*

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